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THE CONSTITUTION

OF THE

UNITED STATES

DEFINED AND CAREFULLY ANNOTATED.

BY

GEORGE W. PASCHAL, LL.D.,

AUTHOR OF "PASCHAL'S ANNOTATED DIGEST," "A TREATISE ON CHARITABLE USES," "DIGEST OF DECISIONS," ETC., ETC.

WASHINGTON, D. C.:

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Law

OF TEXAS.

NEW YORK, 1868.

COLLEGE BALTIMORE

PREFACE.

THE Editor offers no apology for presenting to the public an annotated copy of the Constitution of the United States. All men have fully realized the maxim, "that the next best thing to knowledge is to know where to find it." If, therefore, my book shall serve as a guide to useful and important information, a good work will have been accomplished. But it is believed that something better than the mere collection of copious references has been attained. The best definitions of every word and phrase have been given, upon the very highest authorities. The utility of such a success, if success it be, cannot be over-estimated.

The roots of the Constitution of the United States may be said to have been laid in the great principles of the English Constitution, which divided government into three separate departments, and which, from time to time, secured the absolute and subordinate rights of every subject, upon the firm basis of Magna Charta and the Petitions and Bills of Rights, and other guaranties of liberty. These principles were transplanted

by our ancestors into the American colonies. They were proclaimed in the Declaration of Independence, which, in this edition, precedes the great work of our fathers ; and they were re-incorporated into all the State Constitutions pending the Revolution. Therefore, the division of the powers of government into three departments—legislative, executive, and judicial—was the formation of a structure upon established models.

From the days of the promulgation of the Constitution of the United States to the present hour, it has been a subject of constant discussion. All that was preserved of the debates of the wise men of the Convention, which modeled it, and of the State Conventions which ratified it ; all that was said by the writers, such as the authors of the *Federalist*, and the press of that day, has been republished, and forms a popular portion of our current literature.

Rawle, Sergeant, Story, Baldwin, Duane, John Adams, and Farrar, have written their commentaries upon the Constitution ; Curtis his excellent history of it ; Calhoun his essay, giving the peculiar views of his school upon concurrent powers ; Chancellor Kent devoted the best book in his great work to its elucidation ; all our reports of judicial precedents abound with interpretations of it ; the published opinions of learned Attorney-Generals have guided cabinets ; the debates of all deliberative bodies are interspersed with closely studied or loosely expressed ideas in regard to it ; every political editor and orator become its expos-

itors ; it is taught in all our law schools and many of our colleges, and forms a chapter in the studies of all candidates for the bar ; all officers are sworn to support it ; every soldier and sailor in the late war took a like oath as a condition of enlistment ; all amnestied and pardoned rebels have been required to take oaths to support and defend the Constitution and the Union thereunder ; and, in those States which resisted it, no one is admitted to be registered as a voter, without taking the most solemn oath to the like effect ; every naturalized foreigner is required to swear allegiance to it ; the oaths thus administered, as the ligament or tie of allegiance, are naturally binding upon every native-born citizen in the country. And now, although the sacred instrument has been published in every revision of laws in the United States, in the Manuals of Congress, and by tens of thousands in that excellent *vademecum* by Mr. Hickey, we hazard nothing in saying that the Constitution is not conveniently accessible to one in one hundred of the people whose duty it is to read it. It is not even a book in all our public libraries ; it is not in one house in fifty ; it is nowhere on the catalogue of school-books ; and it is not taught in one school in a thousand. There is a kind of popular fallacy that everybody understands the Constitution of his country, when, truth to confess, comparatively few have ever read it at all, and still fewer have studied it carefully. And if the tenure of office depended upon the ability to stand a careful examination upon it,

there would be enough vacancies to satisfy whole armies of "*outs*," who, in turn, could not take the oath to support it, were the previous test of ability to give all its features applied.

It is in no spirit of disparagement that we make this admission. Perhaps the same remark is applicable, to a greater or less extent, to every civilized people. There is too great a disposition among men to take essential things for granted. And yet when the philosophical historian comes to review the downfall of republics and empires, he is forced to the conclusion that the loss of liberty is more the result of ignorance of the fundamental principles of government than of apathy in defending them. The most exciting political contests which have divided this nation have been the results of political dogmas founded in willful or actual ignorance of the cardinal principles of the Constitution. A recurrence to "Americans shall rule America;" the "repeal of the naturalization laws," as a means of lessening suffrage; religious tests; "squatter sovereignty," and its opposite, need only be cited in illustration. Yet these were harmless polemics compared to the heresy of that peculiar school of "State sovereignty," which taught that the States had, in fact, *surrendered* nothing, but had only *delegated* certain powers, in trust, to a common agent; and that any State could, at any time, for any cause, or no cause, resume the delegated powers, and again peaceably take its place among the nations of the earth.

In such a book as I have prepared, and designed, as it is, for general use, and put forward to meet the wants of the millions, it is not intended to advocate or condemn any doctrine in an offensive manner. My own views of the government were formed after an examination of all the lights accessible to me, from 1830 to 1834. The doctrines of Nullification, or the right of a State to nullify, declare void, and resist a single law of the United States, and yet, as to all other laws, to be in harmony with the Union, were then the issues. From my Southern stand-point, I was compelled to examine the doctrines with all the prejudices of intelligent surroundings and motives of interest in favor of the Southern view. Opposition to a protective tariff; State pride; the apprehensions upon the subject of negro slavery, which the Missouri restriction had left, and the incipency of abolitionism foreshadowed, naturally inclined all ardent young men to embrace the doctrines of the Virginia and Kentucky Resolutions, and the inviting school of "States Rights." But, on the other hand, we had the most prominent author of these reports and resolutions, and, indeed, the chief architect of the Constitution itself (Mr. MADISON), telling us that "Nullification and Secession had the same poisonous root." And we had the weight and power of GENERAL JACKSON's name and his iron will, standing upon the doctrines of that great expounder, DANIEL WEBSTER. I was obliged to take my position as a lawyer, as well as a lover of my country, with those who held that

the Constitution had created a government, not a mere agency or compact ; an enduring union, not a league dissoluble at the pleasure of any State ; a government of limited powers, to be sure, but yet having all the inherent powers necessary to protect, defend, and perpetuate the Union. These views have been greatly strengthened by a life-long study of the principles and practical workings of the government. And they carried along my convictions, that, as a citizen of the United States, I owed my first and paramount allegiance to the nation, and not to the State of Georgia, where I was born, and came to the bar, nor to the States of Arkansas and Texas, where I afterward chanced to reside, and which have been the theaters of the little which has marked my unambitious public career ; nor yet to New York, where now I exercise my profession.

I can most simply illustrate these views by the example of Texas. That Republic, from 1836 to 1846, was independent and sovereign. It possessed the powers of national taxation, commerce, coining money, granting patents, punishing piracies, enforcing admiralty, declaring war, raising and supporting armies and navies, making treaties, forming alliances and confederations, being represented by ministers abroad, and changing the republic to a dynasty, with princes and orders of nobility. In fact, Texas had the lawful right to do all that free, independent, and sovereign States may do. But by annexation these people became citizens of the United States. As a government, they sur-

rendered or merged every vestige of nationality. They lost these rights to regulate commerce ; to coin money and prescribe tenders ; to declare war and make peace ; to naturalize foreigners ; to decitizenize any citizen of the United States, and to exercise every enumerated and non-enumerated national power. In consideration of this surrender of power, all Texans, of whatever nationality, became citizens of the United States, entitled to all the benefits, privileges, immunities, protection, and blessings of the Union. And, when compared to the previous impoverished State of Texas, these blessings were incalculable.

With these convictions, both as to principle and policy, I could never view the ordinances of secession in any other light than as revolution—resistance to lawfully constituted authority, without any appreciable justification. In anticipation of the mad, because excited effort, I prepared a treatise upon the doctrines of secession. But the crash was so sudden, that it smothered my effort before it reached the public eye. None shaken in my views, with the commencement of the terrible civil war, the fearful consequences of which I publicly foretold, not in any spirit of prophecy, but because they were the legitimate fruits of the efforts to sever such a government, I sat down to compile the “ANNOTATED DIGEST” upon the laws of Texas, and the Spanish laws, upon which many land-titles within half the area of the Union rested. I selected a provincial work, because long years of practice had forced me to

collect the materials. The Constitution of the United States formed a single chapter ; and because FREDERICK W. BRIGHTLEY, Esq., had kindly permitted me to use his exhaustive notes, my annotations were not the most labored chapter in the book. I did little more than add to his very accurate references, bringing the notes down to 1865, re-arrange, number, and "cross-note" them, so as to connect the subjects with other kindred matter in my own digest. Yet I have received so many high testimonials of the convenience of arrangement and the great value and accuracy of the references, that I have determined to put forth this little volume upon the same plan of the "Annotated Digest," with the commendations and approval of which I have had so many reasons to be proud.

Upon the suggestions of some popular school-men, the plan of authoritative definitions and side questions has been adopted. While then the work will be an exhaustive reference-book for the lawyer, the judge, the statesman, the publicist, the editor, and the political writer (who should always have such a work upon their tables), it is hoped that it may also prove a popular text-book for all our schools ; or, if this fond anticipation shall fail, I trust that some more experienced hand may be led to prepare a text-book which may become as popular in its appropriate place as was ever Webster's spelling-book.

Let us remember that we have four millions of freemen who have been constitutionally made citizens of the

United States, in whose behalf the fundamental charter has been amended, few of whom can yet read the instrument which guaranteed their liberties, in common with others of their fellow-citizens. We have three hundred thousand lovers of liberty coming every year to our shores ; and we have millions of native-born children, in rural districts and in cities, to whom the Constitution is not accessible. The course of safety, and of the preservation and perpetuation of liberty, would demand that Congress should adopt some well-arranged Manual upon the Constitution, and distribute it among the people. None occurs to the author as better than that which defines every phrase, and points to every higher authority which has discussed it, and which has an index so copious that none can be misled.

I beg all readers to believe that the political bias hereinbefore expressed has had no influence in the preparation of the notes. They have been given, honestly, as they were found in the authorities. If any light has been overlooked, it has been accidental, and the omission will be repaired in the future editions.

There are some great facts which the strongest prejudices cannot overlook. The efforts to establish the doctrines of secession in the name of State sovereignty have tested the strength of the Union ; and whether doubtful powers have been rightfully or wrongfully exercised, they have been so exercised as to become estoppels upon the whole people. The Southern school started upon the theory that the “common de-

fense and general welfare" guaranties must be stricken out of the Constitution. And while they retained the great landmarks, and almost the identical language, the idea of national internal improvements and protective tariffs was forbidden; slavery was attempted to be perpetuated; and our "Rights in the Territories" were so clearly defined, that the people thereof could not protect themselves by their own wholesome legislation. But a single year of war found the anti-internal improvement States-Rights Government making railroads, and in possession of all the railroads and other means of transportation in the States, enforcing general conscription, impressments, martial law, and almost subsidizing the States which had confederated themselves. And as to "new States," Kentucky and Missouri were represented at Richmond, while the governments thereof were firm to the Union. In a word, the plea of NECESSITY afforded an excuse for every exercise of power. So, in the efforts to put down the rebellion, the military power was pushed far beyond the most ulterior centralizing ideas, and every obstacle which stood in the way of preserving the life of the nation was easily removed. West Virginia was admitted as a State of the Union, upon the same principle that Kentucky and Missouri were admitted as States of "the Confederate States of America;" that is, because the minority, who acknowledged their allegiance to the central Government, were recognized as the lawful State governments. It has thus become established,

that the powers to suppress insurrection and to crush rebellion, and the obligation to guarantee a republican form of government, carry along the right to recognize none but the State government in harmony with the Union as a lawfully existing State. Such is the clear theory of President Johnson's proclamations, setting aside State governments and appointing new magistracies; such the theory of Congress in passing the reconstruction laws; and such were the precedents in Richmond, which are binding upon the "engineers hoist by their own petards."

Therefore, the doctrines of "States Rights" seem to be narrowed down to the practical theory, that when all State officials cease to acknowledge the Constitution of the United States, and the laws and treaties made in pursuance thereof, as the "supreme law of the land," and the great mass of the people sustain them in rebellion, they so far lose their positions as States, as to leave the *means* of restoration to the law-making power of the Union, after amendments forming conditions of security shall have been superadded. Such are always the fruits of unsuccessful revolution.

These things are said in the interest of no partisan view. I would only exhort all men, and all children, to consider the Constitution of the United States as perpetual; to carefully study its every word and phrase, and the spirit and intention of every clause. And, above all, never to engage in its discussion without a clear comprehension of every word employed in

regard to it ; and to trust no man nor journalist as an expounder who misquotes its language, and shows a real or willful ignorance of its provisions. Such teachers are the blind leading the blind.

The Constitution has created no authoritative expounder. Every exposition has, at last, to come to the test of popular opinion. How important, then, that the public judgment shall be enlightened. As the war has stricken human slavery out of the Constitution, we all, in some sort, stand upon a new era in regard to the protective principles and the guaranties of liberty which it contains. And yet it is the order of the human mind, under all dispensations, to consult precedents ; to allow them always to be persuasive, and generally controlling. In this light every citation in this little book has its value.

The Editor does not claim perfection even in references, or the extent of research. And as it is intended to keep the work up as long as new editions are demanded, he would be very thankful for any suggestion of errors or omissions. The effort is an experiment. All who will weigh the great problem of liberty, will acknowledge the importance of educating every mind in the true principles of our government. This can only be done by precept upon precept, line upon line, here a little and there a little. If the zeal and anxiety of the Editor is great, let his apology be, that he has suffered keenly from the intolerance growing out of ignorance of the true principles of constitu-

tional liberty, and the reckless depravity in regard to their preservation. His moral duty, in the direction of enlightenment, is therefore great.

GEO. W. PASCHAL, of Texas.

No. 26 Exchange Place, New York.

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PREFACE TO SECOND EDITION.

Many causes have combined to delay the publication of the revised edition of, and supplement to, this work. The editor's labors in other fields have become known to the public. The publication of eleven large volumes, which have received the approbation of the profession, and the labored revisions of some of these, together with a varied practice, have delayed the final preparation of a work which ought to have employed his whole time. Indeed, a careful and thorough annotation of the Constitution of the United States would require the continuous study of an industrious life. The history of the Constitution is the history of the nation; and its thorough criticism would be the repetition of the indoctrinations of the thinking minds of the age. Nevertheless, the kind reception and general commendation which this production has received have encouraged the author to increased labor and expense. No week has been passed, indeed, few days, without some additions being made. To cut these amendments down to readable length has been the greatest labor. This has not been so practicable in the Appendix as in the original text.

When the first edition of this book appeared, the Constitution was undergoing a severe strain. The reconstruction laws, which had resulted from the mad efforts at secession, had not completed the work of rehabilitating the Union; the fourteenth amendment, consequent upon the destruction of slavery, had not received the ratification of the necessary number of States; the fifteenth amendment had only been thought of by a few advanced minds; the differences between the executive and Congress threatened the peace of the country; the events of the seven preceding years had sown a vast

crop of litigation involving constitutional questions; the condition of the newly-emancipated population had not been settled; the passions of the five years of civil war were far from being allayed; and the minds of millions of active men were revolutionary, and only needed seductive leadership to change the whole organization of our Government. But the work of reconstruction has been accomplished; the new amendments have not only been adopted by recognized form, but the nation, by popular platforms, has become pledged to their support; and what is better, they have been construed to the general satisfaction of the country; a sense of popular liberty is gradually recovering ground; and there is greater uniformity as to popular suffrage than at any former period in our history.

It cannot be disguised, that our people are studying the Constitution and its foundations with greater accuracy and a more intelligent understanding of the true character of our complicated governments.

Nevertheless, much yet remains to be done. The Constitution has to be taught in all our schools, and taught by thousands who have yet to acquire its rudiments. This work has been found a useful instrumentality in that direction. The new matter must greatly increase its usefulness.

To embody the new interpretations an Appendix has been found necessary. This may cause occasional repetitions and some contradictory authorities. But it should be remembered that there can never be a fixed standard for the Constitution. It is continually undergoing official interpretation; and the only mode of reaching the truth is by the comparison of ideas and practical results. The Appendix should always be read as a part of the text. Where there is doubt, let the student consult the references.

The book having been introduced into many of our best academical institutions, its future success is assured.

GEORGE W. PASCHAL.

WASHINGTON, D. C., *May* 1, 1876.

LECTURE

DELIVERED TO THE

AMERICAN UNION ACADEMY

OF

LITERATURE, SCIENCE, AND ART,

AT ITS SPECIAL MEETING CALLED FOR THE PURPOSE, MARCH 7, 1870,

BY

HON. GEORGE W. PASCHAL,

AUTHOR OF "PASCHAL'S ANNOTATED CONSTITUTION," ETC.

PRINTED BY ORDER OF THE ACADEMY.

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GENTLEMEN OF THE ACADEMY,—I propose delivering a lecture upon the Constitution of the United States, as it is. I am aware of the difficulty of the theme. Its very familiarity, real and imaginary, admonishes me that no one expects any thing novel. But however trite the subject, few lawyers or statesmen would be prudent to risk a critical examination upon the great charter. And the small number who can repeat it from memory, are well aware that its every word and phrase have been the subjects of angry debate, and schools do not yet agree upon any uniform interpretation. And while the impression is general, that recent amendments have made great changes, very few have stopped to think of the real revolution in our government.

The last ten years have covered a period of eventful history in our own country and in the world. Among all the monuments which mark that heroic era, there are none which have been so mighty in their effects and will so long endure, as the amendments to the Constitution of the United States.

It has always been a favorite maxim with me, that in the

study of the law, there can be no comprehensive understanding, without a careful analysis of the old law,—the mischief and the remedy. The law of the present concerns us most; but until we dig deep, explore the foundations and understand that of the past, we can have no clear conception of that which is actually in force.

Viewing my task from this stand-point, I will advert to the organic amendments as they bear upon the instrument as it was, before they were engrafted upon it, and so enlarged the powers of the nation, abridged those of the States, and increased and secured the liberties of the people. The amendments known as the thirteenth, and the first and second sections of the fourteenth, and also the fifteenth should be read as *pari materia* of the same law. Although of different dates they are logically and necessarily connected, and, taken together, they very radically change the original theory of the government.

I will read them in this logical connection.

“ Amendments to the Constitution.

“ART. XIII., SECTION 1. Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”

“ART. XIV., SECTION 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

“SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting

the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, representatives in Congress, the executive and judicial officers of a State, or the members of the legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State."

"ART. XV., SECTION 1. The right of the citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

To each of these is added,

"Congress shall have power to enforce this article by appropriate legislation." Thus the power to execute is as broad as the subject-matter. And the means to be employed may be all that are necessary and proper, either to enforce the national power, restrain the States, or to protect the citizens.

A glance at the history which produced these great results is an inviting field; but it would be the history of the government itself. The word "slavery" is here, for the first time, introduced into the Constitution. But as a fact it was acknowledged in the contrast to "free persons," and the "two-fifths of all other persons," in the basis of representation now supplied by a new clause; in the "importation of such persons" as any of the States originally existing should think proper to admit for a period of twenty years; in the "persons held to service in one State escaping into another," and in the prohibition to amend so as to prohibit the importations of "such persons" until 1808. Thus our fathers shrank from the mention of the

word, so at war with the enlarged idea, that "all men are created free and equal," for which they had fought, as a self-evident proposition; but they did not hesitate to incorporate three-fifths of them into the representation, giving an increased power, without any of the moral responsibility which should ever exist between representatives and constituents; to provide for their increase by licensing the barbarous and inhuman traffic in them, without the possibility of removing the moral taint for the fifth of a century; and by entering into a solemn compact among the States to surrender those who should endeavor to escape from their servitude.

Far be it from me to censure those who thus dealt with great facts as they were. The States were free to agree to this "more perfect union" or not as they chose; and as the union could not have been formed without this compromise, he is a bold man who will now say that it would have been better had it never been created.

The time limited for the slave trade having elapsed, our fathers made haste to prevent it, in a great measure, by severe prohibitory legislation. They also narrowed the area in the Northwest by the contemporaneous ordinance which excluded it from the common territory. And as men emigrate more from instinct than reason, and the march of our people has been westward, the free territory received three times the accessions from the slave section which the latter received from the former, thus transferring the balance of power to the division of free labor.

The time has hardly arrived to discuss the institution of African slavery in America, humanized as it was.

Born and reared in its very center, having spent my life in its midst; surrounded by the school which defended it, yet never responsible for its evils, I am not here to severely censure one generation or another in regard to it. Certainly I am not going to defend it, or to deny that in all its tendencies it was economically depressing, and nationally, religiously, and in

dividually demoralizing. It is enough that it is thus described by the best of our law writers:—

“By the civil law slaves could not take by purchase or descent. They had no heirs, and therefore could make no will. They were not entitled to the rights and considerations of matrimony, and therefore had no relief in case of adultery. Nor were they proper objects of cognation or affinity, but of *quasi* cognation only. Contubernism was the matrimony of slaves; a permitted connection, not partaking of the lawful marriage, which they could not contract. The state of slavery in this country compares with that existing under the Roman law in many respects. The progress of society in civilization, more correct notions on the subject of moral obligation, and, above all, the benign influence of the Christian religion, have softened many of the rigors attendant on slavery among the ancients. But the rights of the slave in respect to marriage, and the acquisition of property by way of inheritance, remain substantially on the same ground.”

To this evil may be added the absolute right of buying, selling, controlling, and almost unlimited punishment by the master; the necessity of preaching a lower religion for the slave, and of giving a lower interpretation of the Divine Word; of denying all education to the bondmen, and yet to live in the constant dread that they would at some time assert their freedom.

But all these evils and every fancied good have been swept away by these few simple words: “Neither slavery nor involuntary servitude * * * shall exist in the United States, or any place subject to their jurisdiction.”

I would gladly turn away from the sight of the serried hosts, horses and chariots, which perished in the red sea of blood, in the background of these words engraved upon the tablets of the great American heart. I am persuaded that a smaller number would be found to cancel this declaration, than to dash to pieces the tables of stone on which were engraved

the Divine commandments amidst the thunders of Sinai. The destruction of slavery was the loss of fortune and of all the advantages of affluence to many families. They can illy adapt themselves to the change. Yet few would take the step backward. The States where it existed, however unwillingly at the moment, acknowledged the necessity of engrafting this same principle into their own organic laws, and, generally, they ratified this amendment. It was proclaimed on the fourteenth day of December, 1865. It not merely swept the name and the fact of the system from all our laws, and took from the States the power to restore them, but it also opened new fields of inquiry.

Through all the history of our country words of ordinary signification had been of very doubtful meaning in our law and polity. Thus "people," "persons," "citizens," "residents," and "inhabitants" had to be twisted and tortured in every place where they described the free man, the native of the soil, the naturalized man, the elector. The tinge of color, whether in the free States or slave States, with a few exceptions, was a sufficient crime to exclude from all rights the emancipated people of African descent. They were not acknowledged to be of the "people" who ordained the Constitution; the "electors" who might choose representatives and president; the "citizens" eligible to any office, or entitled to inter-state "privileges and immunities," to passports, trial by jury, or to the rights of property. They were denizens with no defined *status*. Yet, whether as men or chattels, these beings were a mighty element in the political history of the nation until the final day came. "Soundness upon the negro" controlled all other politics. Extremists for or against slavery were the successful competitors for honors. And when, by war, and as the logical fruit of the contest, four millions of freedmen were added to the nondescript half million of emancipated, free persons of color,—half of whom were in the free and half in the slave States,—there still remained a problem

which had to be solved. The word "citizen," which meant one thing for representative, another for senator, something more definite for President, but entirely indefinite as to rights in the national courts, of twelve classifications as to the modes of creation and description, of no signification as to the right of suffrage, had now to be defined by organic law. It is strange that no definition is found in the original instrument, or in any of the first twelve amendments, which constituted our bill of rights. The comprehensive language transmitted from Magna Charta was generally held not to apply to those who could not claim Caucasian descent.

As a necessity, a definition and some remedies for the invasion of their civil rights had been passed over the President's veto. The angry discussions which followed, and the conflicting opinions and judicial decisions upon the constitutionality of the civil rights law, rendered it necessary to remove the doubts as to congressional power, or to recede, to make the law organic, or to risk its repeal. The former course was adopted, and more comprehensive words could not have been employed.

"*All persons* born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

This, with other sections of this amendment, was put before the people and virtually carried by popular elections. But however carried, it has been proclaimed and acted on as a part of the organic law; it is the universal sentiment of the nation; and there is no fact against the means which does not apply to the thirteenth amendment. All the amendments have been adopted by the great law of general acquiescence. So that we could no more recede as to the one than the other.

As already intimated, the term "persons" had been one of varied signification. But contemporaneous history leaves no doubt of what was intended here. By general terms it was intended to incorporate those made free by the thirteenth

amendment into the body politic ; and to leave no doubts as to the naturalized, whether by uniform rule, by purchase, conquest, annexation, or treaty. They all alike are entitled to the proud distinction of American citizenship.

And looking to the past evils in reference to the colored race, and the naturalized, and to the shameless intolerance against the freedom of conscience, of the press, and of speech, the guaranty was added, that “no State shall make or *enforce* any law which shall abridge the privileges or immunities of citizens of the United States ; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.”

Thus, whoever is born within the jurisdiction of the United States, or is naturalized, goes forth with full assurance that to the States is denied the power of discrimination against him.

How few lawyers even have contemplated the full scope of this declaration ! Life, liberty, and property embrace the whole range of civil rights. The simple phrase, “no State shall pass any law impairing the obligation of contracts,” has brought almost every imaginable contract into review before the Supreme Court of the United States. So these much more comprehensive words subject every character of State law to the final supervision of the highest national tribunal. For what law can be passed which does not, in some way, affect the privileges or immunities, or the life, liberty, and property of the citizen ? Not that States may not legislate upon all these subjects, but all legislation must be in obedience to the paramount law.

But as “privileges and immunities” did not mean that a citizen could carry the local laws of his State into another State, but that he is only entitled to the rights and privileges of the citizens of that State, no more nor less, and as he was not entitled to vote, as one of his privileges, until the constitution or laws of that State gave him *power* to vote : and, as from the

foundation of the government, the States had claimed and exercised the right to determine what shall be the qualifications requisite for electors, and that right had been so exercised as to produce most incongruous inconsistency, with no uniformity, save as to sex and age, and approximate uniformity as to color, and as the second section of the fourteenth amendment recognizes the power of excluding male inhabitants, being citizens of the United States, at the expense of a corresponding deduction in the national representation, a further amendment to take away the power of discrimination on account of race, color, or previous condition of servitude, seemed to follow as a logical sequence. The constitutions of States were liable to be changed. There was gross injustice in forcing this suffrage upon the most unwilling States, while the conquerors refused it for themselves.

It must be borne in mind that the governments which the executive had built up in the States which had been engaged in the war against the United States, with a single exception, rejected this fourteenth article, and the thirteenth had been passed without the concurrence of two of them. In their constitutions of 1865 and 1866, these States, in common with the great majority of the States of the Union, had excluded the black race and their descendants of every hue from all political participation in the government. They nevertheless claimed that two-fifths of the late slaves had been added to the representative basis, while to the whites was committed all political power and nearly all the civil rights of the country. How far it was possible or proper for a government which had employed many of the representative men of this race in conquering those who had made so desperate a struggle to destroy the Union, is a question about which men and parties have differed widely. According to my notions of justice, it is impossible in a republic long to exclude one-eighth of the whole fighting population from the polls. The organization of political parties and their struggles for power, forever create advo-

cates for the manumission of all inhabitants, whether citizens or not. Nearly all distinctions based upon property have been destroyed, upon the principle that life and liberty, to which all have equal rights, and which the poor find it more difficult to protect than the rich, are dearer than property.

The weak expedient of clerical qualifications fails to satisfy the philosopher and statesman. Instinctively the mind rushes to the conclusion that citizenship and manhood responsibilities to society are the safest tests. About this there may never be absolute agreement; for there is a proneness to distrust the wisdom of the masses; but of this we may be certain: liberty on this continent takes no step backward. Therefore, we need not inquire whether it was wise or unwise to ratify the fifteenth amendment to the Constitution. It was a measure forced upon statesmen by the logic of events and the necessities of previous departures.

We may admit that the independent owner of freehold or other property is a safer voter for that property; and even that the larger may be his possessions the more careful will he be of the true interests of the body politic. But property is only one of the absolute rights of freemen. Life and liberty are dearer to all men than property, since for his life will man give all that he hath. So we may agree that the more learned man is in the wisdom of schools, the less liable is he to be deceived by demagogues, and the more certain is he to cast his vote for wise and virtuous magistrates. But these admissions only impose on us the duty of maintaining institutions so just and equal that the industrious may easily acquire independence; and so enlightened that education may be accessible to all. There is no incentive to become wealthy and wise so strong as the desire to participate in public affairs. The country which gives the ballot and opens the road to preferment, erects the school and displays glittering prizes to ambitious students. Therefore, whether the country took a philosophical view of the subject or not, the theory of action was, that by the rebel-

lion, governments practically responsible to the United States, had ceased to exist in the revolting States; that the governments of the President were provisional only, and not in harmony with the changed order of things; that the mode of rehabilitation and restoration to all the benefits of the Union were within congressional control, and, as a means, suffrage was bestowed upon the black man in the work of reconstruction. This was the logic; these the motives.

When the historian shall come to consider the whole framework of reconstruction, both under the President and under Congress, from a philosophical stand-point, he must arrive at the conclusion that all these exercises of power were for the purpose of securing these new organic guaranties.

The Constitution had to be amended so as to destroy slavery. The President said to the legislatures of eleven States, where it had most existed, "ratify the thirteenth amendment," and nine of them did it. Congress said, "this is not enough; we must have a fourteenth article." The President differed, these same States refused and Congress devised the plan of creating legislatures which would comply. The reconstruction laws did the work, and also enabled Congress and the willing States to superadd the fifteenth amendment. The change has been accomplished as the logical result of the war of ideas upon the great subject of human slavery.

This is not the proper place to discuss whether these exercises of power, first by the President and afterward by Congress, were founded in wisdom or not. My purpose is to accept the facts and to discuss the Constitution as it is; and fully conceding the power so to amend under the forms of the Constitution, to inquire what are now our rights? It is useless to discuss the means employed to attain the ends. Millions who opposed would more strongly resist all efforts to retrace our steps.

The thirteenth article having destroyed slavery, the fourteenth having fixed upon the freedmen the *status* of citizenship,

and brought every State law under the immediate supervision of Federal control, and the fifteenth having withdrawn from the States the power to discriminate between electors, it follows that as to rights before the law and at the polls there can be no distinction on account of race, color, or previous condition. And whether these amendments be regarded as explanatory or declaratory, the practical workings of the government have thus been changed. Two-fifths of four millions have been added to the representative basis; twelve hundred thousand have been added to the voting population; four millions and a half of people have been started on the road of human progress; an all-absorbing paramount issue has been measurably removed from the arena of party politics; four millions of litigants have been added to the list of those who may assert their rights in our courts, become the holders of property, the recipients of fortune, and the subjects of intellectual wealth. Thus while the States have lost much power, the masses have gained many new securities for liberty. Suffrage has been engrafted as a privilege and immunity which a State can no more infract than it can any other absolute or subordinate right. Those who complain that there is tyranny in this, forget that liberty to every citizen has gained a higher stand and a securer foundation.

This is not the place to indulge in prophecies as to the future consequences. There are those who believe, that this freedom will be the destruction of the colored race; that their numbers have already decreased and will continue to decrease; and that finally, by decay and amalgamation, they will perish away. It is neither expected nor desired, that they should increase in the slave ratio. Since the four hundred years of Egyptian slavery which swelled the seventy-five of Jacob's descendants to three millions, who escaped through the Red Sea, there has been no such increase, as the statistics of American slavery foot up from 1810 to 1860. Such an increase in two hundred years would have given that race two-fifths as many inhabitants as

there are now in the world; and in three hundred years their numbers would have been swelled to three times the present population of the globe. And if the same ratio were possible, half the time which has elapsed since Joshua took up the line of march with his army of 600,000 warriors, would leave no foot of earth for the black man's tread!

But let not this problem alarm. With the aid of immigration to the United States, the white race has increased in a corresponding ratio, our total of all races swelling from 7,239,814 in 1810 to 31,443,322 in 1860. The same ratio of increase would give us eleven billions, three hundred and forty-three millions, four hundred and thirty thousand, one hundred and fifty-nine (11,343,430,159) inhabitants within two hundred years.

The human mind loses itself in contemplation of the destiny of this continent which a rude civilization discovered in the fullness of time. With a Constitution which now secures equal rights to all; liberty and protection for every race; a continent so vast in its resources, and the inhabitants of which are so ready to be incorporated into one great republic; with the new discoveries in medical science and the ameliorations which promote longevity; fifty thousand miles of railroad and the system yet in its infancy; an interstate commerce which far exceeds the international commerce of the whole world; with telegraphy which affords instant communication with nearly all the inhabitants of the earth; with the great hives of Asiatic myriads coming to our western shores, and already rolling back the tide of immigration to the valley of the Mississippi; with an ever-restless population, which can not pause in the work of improvement, what may we not expect of our glorious country under its wise government? And who will undertake to say that this arithmetical ratio of increase will not be maintained?

"War, pestilence, and famine" are the three great curses which God has inflicted to arrest the multiplication of erring man.

The Genoese sailor found here a scattered race, whose abnormal state seemed to be that of exterminating warfare. They had made little or no progress in the arts of civilization; they have improved little by contact with the European immigrants; they have well nigh perished before our advancing strides; and they are the only people to whom our Constitution is erroneously believed not to extend brotherhood. My own reading is, that upon them, as upon all others, has been cast the inestimable boon of American citizenship; and safety, peace, uniformity, justice, and humanity demand that they should be brought under all the responsibilities of our government.

We have just passed through a terrible civil war; but it is not believed that it has materially arrested our ratio of increase, although when we think of the half million of widows, actual and prospective, which it has caused, we might well anticipate some diminution, were it not overbalanced by the swelling stream of immigration.

Pestilence, in the proper sense of the term, our fathers have not known, although contagious and miasmatic influences have often caused great mortality in some sections of our country. But these epidemics have now disappeared from many geographical belts for over half a century, and the improvements in science give us hope that the ratio of mortality will decrease.

Famine is the climacteric in the curse. As yet it has been endured by comparatively few upon the continent; it is little dreaded by the most indigent in our crowded cities; it is unknown in our rural districts. The vast accumulation of wealth, organized benevolence, equalized and self-protected labor, the more humanized tendencies of men, and the daily increasing independence of women, make gaunt famine a thing not to be feared while the earth is equal in productiveness to the demands of its inhabitants. If we shall be preserved from war and pestilence, there is a mighty field for the philosopher

and the lover of his race to be occupied in improving our soil, diversifying our industries, and increasing food in a corresponding ratio with the increase of consumers.

If we can but remain peacefully as one government, tolerating every difference in religion, observing scrupulously the true landmarks between State and National authority, avoiding those corruptions among magistrates which destroy confidence in popular rule, maintaining justice with equal balances, and enlightening the great masses, we have nothing to fear from wars, few physical causes for pestilence; and, if we would avoid the greater calamity of famine for coming ages, the most enlightened minds must devote their best energies to the improvement of the earth and the multiplication of the food-producing animals of the world.

But I am traveling out of my field. I had only intended to discuss the rights of the citizen under the Constitution as it now is. To render these rights secure under the national ægis, wise legislation and laws to suit the changed organism, are loudly demanded. The power is only limited by the appropriateness of the remedies. Legislators have not yet risen to the emergency. The transition has been so sudden that the people are hardly yet awake to the wonderful reality.

In the third section of the Fourteenth Amendment there is a punitive change. It reads as follows: "3. No person shall be a senator or representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may, by a vote of two-thirds of each house, remove such disability."

Considered as a punishment merely, the expedient is hardly worthy of a great nation. As a preventive remedy for the future and a means of security, it is a kind of logical sequence to the third clause of the sixth article, which declares that precisely the same class of officers shall be bound by oath or affirmation to support this Constitution. The theory is, that that oath once taken as a condition to the exercise of a trust, creates a perpetual and enduring allegiance, higher and more sacred than the natural allegiance due from every citizen to his government; and that the magistrate and ex-magistrate who disregards his oath should be disqualified from the exercise of office in the future. As a means of securing this amendment the reconstruction laws excluded from the work of reorganization the same class of men, by the use of the same words, and by the explanation that "officer," as here used, meant *civil officer*, and that the disqualification was only intended to extend to such.

It is enough to say of these laws, that they have accomplished their end—the ratification of the Fourteenth Amendment, and the logical sequence of this forced change, the Fifteenth Article. And now let us hope, as I sincerely believe, that the necessity for this disqualification no longer exists; and that the congressional clemency may be exercised, and full peace and confidence restored, and all citizens, without distinction, started upon an equal race of usefulness in the development of our yet infant country.

It is an encouraging fact that the States are amending their constitutions to conform to the changes, and are restoring the franchise to all. This is wisdom, although it may not be necessary. Voluntary assent is always more desirable than compulsory means. All agree that the Constitution is the supreme law; and when it clearly defines a right and grants the power to protect that right, a uniform law may certainly be passed to enforce it. But in a large degree government must rest upon the consent of the governed. And to make a law

effectual, it must be in harmony with the popular will. Yet these are not reasons why Congress should not do its whole duty, by enacting a wise code for the protection of civil and the security of political rights. And certainly there can be no such oblivion to past erroneous interpretations as a thorough understanding of the radical changes.

Let it be understood that these amendments have expurgated human slavery from the Constitution of the United States, and from the whole country under their jurisdiction; have changed the representative basis and founded it upon voters as well as numbers; have defined national citizenship and thrown around it the guaranties of Federal protection; have limited, if not entirely withdrawn the powers of the States over suffrage; have made sacred the official oath to support the Constitution, and fixed the seal of disqualification upon those who in the past have, and in the future may, engage in rebellion against the United States; and, as germane to the national security, the faith of the people is pledged to the payment of all debts, past or future, which have been and may be incurred in the suppression of insurrection or rebellion; while the stamp of repudiation is fixed upon all debts, State or corporate, which may have been incurred in aid of these causes.

These are, indeed, mighty facts accomplished. They are restrictions upon the State and Federal governments, so that we could only return to the past by the same road through which we have reached the present.

It may be asked, what are now the powers of government after the incorporation of these amendments, superinduced by so great a revolution? Here I wish not to enter upon debatable ground. We are all agreed that the objects of the Constitution were to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and to secure the blessings of liberty to the whole people and their posterity. This

preamble yet remains the key to the whole instrument. It is more appropriate than it was before a single amendment was made.

We agree that these objects are to be attained by the election of senators and representatives to Congress in the mode prescribed in the Constitution, and at the times and places and in the manner fixed by the States, unless the regulations be modified by Congress; in choosing a President upon the basis of representative numbers; in organizing and maintaining judicial tribunals, and conferring upon them all the jurisdiction contemplated by the Constitution as it was, and by the amendments intended to secure the personal and political rights of every citizen.

As the government is one of limited powers, the manner of their exercise has been, and always must be, questions about which patriots may differ.

It is a notable fact that in the history of the country the interposition of the executive veto has been so rare as always to attract attention, and when the occasions have been of moment the people have generally decided at the polls in favor of right. So of all the laws ever passed by Congress, only half a dozen of them have been held by the Supreme Court of the United States to be unconstitutional. And when these decisions have not been in harmony with the judgment of the nation, they have hardly had the practical force of precedents. In no nation in the world has there ever been such an array of legal mind, or such modes of constant judicial enlightenment. In a complex government, where there are thirty-eight, and soon must be fifty, appellate expounders of the Constitution, besides the hosts of publicists, reviewers, and barristers necessary to carry on such a machinery, absurd and untenable precedents can maintain no permanent hold. Courts may not bow to the popular will; but they can never withstand the just criticism of a nation of lawyers. So the great power of impeachment, although several times attempted, has only twice

succeeded. We are thus taught that these extraordinary powers of one department of the government over the hasty or corrupt action of another are fraught with no danger, since, with them, the independent action of legislative, executive, and judicial functions can be harmoniously preserved, and all are alike responsible to the great alembic of popular judgment.

The enumeration of powers and familiar precedents force all to admit that the national government has the right to collect national taxes, duties, imposts, excises, and postage; to regulate commerce; to coin money, and regulate the value thereof; to pass uniform rules of naturalization and bankruptcy; to levy war; keep armies and navies; to make treaties and national compacts; to send ambassadors abroad; to purchase, conquer, and annex states, and thus enlarge the area of freedom; to suppress insurrection and rebellion; to fulfill the guaranties to the States of full faith and credit to judicial proceedings; the rendition of fugitives; republican form of government; the organization and supervision of Territorial governments, or "inchoate States;" the exclusive control over the Federal district, forts and arsenals; all matters of admiralty; the punishment of piracies and felonies upon the high seas; and now to protect the citizens, not only against foreign oppression, but against the encroachments of their own State governments and of one another; and that the National government and the States are restricted from passing bills of attainder and *ex post facto* laws, creating titles of nobility, establishing religion, or preventing the free exercise thereof; abridging the freedom of speech, of the press, or the right of petition; instituting domiciliary visits; abolishing grand juries and jury trial for the citizen not connected with the military service; invading life, liberty, or property without due process of law, or in any matter violating the most enlarged principles of republican government.

These are the great cardinal features of the government, and there are others of lesser moment, restricting direct tax-

ation to representative numbers, forbidding export duties and other matters, of detail and security against Federal legislation, and which prohibit the States from the exercise of national powers and making compacts with sister States—grants and restrictions which have not been increased or diminished by the amendments. And these very amendments have demonstrated what our fathers learned in the early days of the Republic, that if evils, real or supposed, exist, the charter itself has provided a peaceful mode of incorporating new provisions or abolishing old ones. And that fourscore years have elapsed, and only fifteen amendments, mostly declaratory, have been incorporated, is encouraging proof, that none will be rashly made.

There is one feature in the history of the fourteenth and fifteenth amendments which might have assumed a serious form, but which fortunately, under the mighty influence of popular sentiment, we have escaped. I allude to the fact that after the amendments had been “ratified by the legislatures” of several of the States, but before the necessary “three-fourths” had spoken, legislatures subsequently elected passed resolutions recalling these ratifications. Here is a great question of power. The word *ratify* occurs but twice in the instrument, once as to the mode of amendment, and once as to the “ratification” of the original instrument by nine States. As to the latter, the nine might thus agree upon a government for themselves to the exclusion of those refusing their concurrence. But as to amendments three-fourths may ratify for themselves and for those refusing. Without any reference to the political aspect of the controversy, it has always seemed to me that the derivation of the word and the reason and spirit of the article lead to the conclusion, that whenever a convention, as in the original case, or a legislature, as in the fifteen others, had ratified the whole instrument or an amendment, it agreed that so soon as the appropriate number should do likewise, the whole or the amendment should be binding; and that the force of the con-

sent could not be dependent upon the subsequent will of the ratifying State, but upon the wills of the other States which might follow, indeed might have been induced to follow those very States which attempt to revoke their ratifications. The foundations of government are too deep, and the superstructure of too mighty weight to be the subjects of annual caprice.

I have carefully examined the subtle arguments to the contrary. They seem to me to be kindred to that theory which has cost rivers of blood and mountains of debt, the monstrous assumption that a State might, at any time and for any cause, withdraw its ratification of the Constitution and set up as an independent nation.

Our Constitution rests upon no false notions about the preceding sovereign character of the States. They are bound by the surrenders to the extent of the expressed and clearly implied powers. And every covenant, including the right to amend in the mode provided, is one in which every citizen, as a citizen, as well as every corporation as such, has a deep and abiding interest; and terms of such covenant can only be peacefully changed in the manner provided in the instrument.

We of Texas have little right to misunderstand what we surrendered. We were a constitutional republic. We had a flag and seal; a national existence; army and navy; foreign treaties; the right to coin money, and to do every thing which an independent nation may do. But by the act of annexation we saw our lone star move away and become the largest, if not the brightest, in the national galaxy. We knew and we felt that we were a nation no more; but only one thirtieth part of a great and mighty Republic. An effort to snatch the old star from the constellation has not hurt it, but greatly humbled those who so grossly mistook the theory of government. Conquered, punished, and humiliated, that State, so fruitful of useful revolutionary precedents, is to-day asking readmittance to the full fellowship of our national fraternity. We return

wiser if not better men, and we return to stay and grow as we did during our first decade in the Union, to increase threefold in ten years, and to become the great theater for new improvements, and the field for young and vigorous growth.

The history of the last ten years has "written and lead in the rock forever" that an appeal to force, as a redress of temporary evils, or as a security for apprehended dangers, arouses the nation to a sense of the value of the compact, and more firmly binds us in the bonds of union. Therefore, there is no reason to despair of the Republic, so long as the true philosophy is understood, that our Constitution is ordained by the people and for the people, and that all magistrates are but the servants of the people, directly responsible to them. It should be the mission of every patriot, as far as in him lies, to teach the people the true principles of the Constitution; to enlighten them as to their rights and responsibilities as citizens, and to shield them against wrong.

To its study I have given much of my life. My permanent reproductions have been few, and only in the form of collecting definitions, arranging references and facts, and so systematizing the whole as to arrest the attention of students, and make easy the thorough mastery of the great principles which underlie our government. If my researches shall have aroused the attention of a few thoughtful minds, I shall felicitate myself in the belief that my time has not been misspent. And could I select my own niche in the temple of fame, I would prefer to be remembered as the writer who had been most successful in making easy the study of the charter of our liberties. If this Academy shall give a part of its influence to the philosophical teachings of the Constitution, and in demonstrating how in its thirtieth decade it can be the bond of union for more thousands of millions of souls than millions at the commencement, future ages will have reason to bless our labors.

LETTER OF GEO. W. PASCHAL TO THE PRESIDENT,

ASKING FOR THE

PARDON OF LODOVIC P. ALFORD AND OTHER CITIZENS,

IMPRISONED BY MILITARY COMMISSIONS UNDER THE
RECONSTRUCTION LAWS.

WASHINGTON, D. C., *July 4, 1870.*

To his Excellency, U. S. Grant, President of the United States.

MR. PRESIDENT: On this day, so sacred to liberty, I respectfully ask you to commemorate its infinite blessings by ordering the release of Lodovic P. Alford, who is lingering out a miserable existence in the penitentiary of Texas. And in asking this exercise of Executive clemency, I may as well frankly admit that the reasons which I shall present will be alike applicable to all others who are enduring incarceration under like circumstances.

I wish you to understand that this plea is not made by a lawyer merely for his client. My duty to my country rises far above that sacred relation. The prayer is made by a citizen who has endured much suffering under military rule; a man who has always made the Constitution his polar star; and an author who has contributed his mite towards the preservation and restoration of constitutional liberty, and the exposition of its great charter; and who cannot rest quietly while the humblest citizen is enduring imprisonment which the Constitution forbids.

This day commemorates the ninety-fourth year of American independence, and it naturally invites us to a retrospect of the time, the occasion, and the reasons which inspired our fathers to proclaim the immortal heritage to man. But, for

one, I confess my inability to take that retrospect with satisfaction while there lingers in a loathsome dungeon, a single American citizen, with no constitutional warrant for his imprisonment.

I find in that declaration these significant passages, then applicable to the tyrant from whom our fathers severed their allegiance:

"He has made judges dependent on his will alone, for the *tenure of their offices*, and the amount and payment of their salaries.

"He has erected a multitude of new offices, and sent hither swarms of officers to harass our people and eat out their substance.

"He has kept among us, in times of peace, standing armies without the consent of our legislature.

"*He has affected to render the military independent of and superior to the civil power.*

"He has combined, with others, to subject us to a jurisdiction, foreign to our Constitution, and unacknowledged by our laws; giving his assent to their acts of pretended legislation:

"For quartering large bodies of armed troops among us:

"For protecting them by a mock trial, from punishment, for any murders which they should commit upon the inhabitants of these States:

* * * "For imposing taxes on us without our consent:

"*For depriving us, in many cases, of the benefits of trial by jury:*

"For suspending our legislatures, and declaring themselves invested with powers to legislate for us in all cases whatsoever."

Who, on this holy day, can read these extracts, and remember the history of the last few years without fear and trembling? What single specification in all the charges is not applicable, in all its force, to the people of ten States? It is no answer that they may have deserved this cruel and unusual punishment. The responsibility is always upon the

governors, not the governed. A Cæsar might weep, and say, "They would have it so!" but the responsibility was none the less upon Cæsar. The ministers of George III could find excuses for all their acts of oppression in the obduracy of the colonists. But they learned not the lesson, that men who understand their rights regard the employment of unconstitutional means, to obtain desired ends, as worse than the evil intended to be eradicated, or the irregularities intended to be punished. No people ever hold themselves responsible for their oppressions; nor is it right that they should.

Thus understanding the philosophy of government, I feel that I can, with the more freedom, invite your Excellency's calm attention to this fearful indictment against a ruthless monarch by a portion of his dutiful subjects. They are, indeed, frightful charges; but they fall far short of the grievances of my native and adopted States for now nearly ten years. I assure you that, under every régime, oppression has only differed in form and degree. During all that time vigilance committees, committees of safety, martial law, military commissions, conscriptions, impressments, taxes levied and collected by military power, suspension of civil law and of the inestimable writ of *habeas corpus*, trials, incarcerations, and executions by self-constituted regulators, by judges dependent upon the caprice of military commanders or unconstitutionally constituted military commissions and provost marshals, have destroyed liberty and almost smothered out its spirit in those States. In 1862 Jefferson Davis and his military authorities, who controlled the rebellion, placed under martial law the people of eleven States over which they had control; and they subjected many good citizens to trial by military commissions and provost marshals.

In my own person then, and in 1864, I resisted this arbitrary exercise of power, and appealed to the constitutions, to history and the principles of *Magna Charta*, and the bills and petitions of right forced from the tyrannical kings of England. I was

joined by others, by men who placed the preservation of liberty, with the loss of their cause, above the slavery of their own race, even with success and a disrupted Union. While we were not able to save many citizens from military oppression, and not a few from the loss of their lives, yet we forced the Congress of Richmond to declare martial law abolished; and we awakened the people to the real character of the cause for which they were pouring out their blood and treasure. This arbitrary exercise of military power, this utter disregard of constitutional liberty, was the first serious blow to the Confederate cause.

I know that it is not necessary that I should mention this history to remind your Excellency that no man, in all the southern States, will have the temerity to attribute any plea which I make in behalf of my fellow-citizens into giving any indorsement to the rebellion, or of having any sympathy with the plans and purposes of the rebels. Nor will any one claim me as an apologist for murderers. No man in all the nation was more shocked than myself at the murder of George W. Smith, and the worthy colored men who were slain with him, by an infuriated mob. There are no greater blots upon the escutcheon of our country than these vigilance committees and irresponsible mobs, save and except those military star-chamber organizations, which assume to try citizens for crime in the face of the Constitution. Vigilants and mobocrats are answerable to their returning consciences and to civil law. The crimes of unconstitutional tribunals are the sins of the nation and its rulers.

Now, had it been proved before a constitutional civil tribunal, to the satisfaction of a jury of his peers, that Alford was present, aiding and abetting the perpetrators of this monstrous crime at Jefferson, I should be the last to pray that the extreme penalty of the law should not be inflicted upon him.

But, Mr. President, Alford was tried in star-chamber by a secret military commission appointed by General Reynolds,

who then, directly and indirectly, exercised all executive, legislative, and judicial power over one million citizens of Texas. Alford was found guilty of murder in the first degree; he was sentenced to imprisonment for life in the Texas penitentiary, and he is to-day suffering under that sentence, and under color of no other authority. There is no law in Texas for a lifetime imprisonment. Our penalty for murder in the first degree is death; in the second degree it is imprisonment for a term of years. (Paschal's Digest, Article 2271.) Had the commission found in favor of the death penalty, it would have been the duty of your Excellency to examine the facts, in accordance with the practice in military trials, and, if not satisfied upon the evidence or the law, as I am sure you would not have been, you would have set the sentence aside. But the approval of the commanding general made complete the sentence, wholly unsustained by the law and evidence. And, although I am told that the record has been transmitted to the office of the Judge Advocate General, yet access to it has been denied to the counsel of Mr. Alford. The conviction, therefore, of Lodovic P. Alford stands upon the sentence of a military commission, appointed by Brevet Major General Reynolds, commander of the fifth military district, which sentence was approved by the same general. This is a stab at the Constitution and the Government which is more fatal to liberty than the crime which it sought to punish.

I need not tell you that Alford is a citizen of the United States; that he never was in all his life in any way connected with the army or navy, or with the militia when in actual service. Nevertheless he, a free citizen, has been tried by a secret military tribunal, composed of military officers, in accordance with military forms, and sentenced to imprisonment for life!

In all the black catalogue against George III, our fathers urged no such crime as this against the Constitution and the law. In the reign of Charles I, citizens were imprisoned by

military power, and judges were appointed who held that it was a sufficient return to a *habeas corpus* that the prisoners were held by military order. But that decision could not stand. The unfortunate prince was forced to yield the petition of right, and to release the prisoner before he lost his head for the violation of English liberty. And his levy of ship money to support his wars was not a crime half so black as his imprisonment of citizens by military power alone, his denial of the writ of *habeas corpus*, and his appointment as judges of creatures to do his will, rather than to administer the fundamental laws made to protect the subjects in the enjoyment of their lives, liberty, and property.

To Congress is given the limited power to constitute tribunals inferior to the Supreme Court, and to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations. But, by the same instrument, "the *judicial* power shall extend to *all cases*, in LAW and equity, arising under the Constitution, the laws of the United States, and treaties made or which shall be made under their authority." And by a clause in the same section it is written:

"The trial of *all crimes*, except in cases of impeachment, shall be by *jury*; and *such* trial shall be held in the State where the said *crimes* shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may *by law have directed*."

A "CASE IN LAW" may arise as well upon a *crime* as upon a civil matter. A "TRIAL" is an examination before a *competent tribunal*, according to the laws of the land, upon the facts put in issue, upon *indictment* or *presentment*, for the purpose of determining the truth of such issues. The framers of the Constitution, and all judges and commentators who have passed upon this article, have defined this "*trial*" to mean, *per pais*, or by the country; that is *by a jury*, who are called the *peers* of the party accused, being of the like condition and

equality in the State. And by a "JURY" was then understood, as it was understood in *Magna Charta*, to mean *ex vi termini*, a trial by a jury of twelve men who must *unanimously* concur in the guilt of the accused before a conviction can be had.

This was the universal understanding at the time of the adoption of the Constitution. But so great was the jealousy of the people that they would leave nothing to inference or the definitions of their ancient law. Hence, in 1789, certain amendments were proposed and adopted, which declared that "no soldier shall, in time of peace, be quartered in any house without the consent of the owner; nor in time of war but in a manner *prescribed by law*;" that the people should be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures; and that no warrant should issue but upon probable cause supported by oath or affirmation. And to leave no doubt that a "*trial*" meant a proceeding in a civil court, in accordance with the rules of the common law, by which a presentment or indictment was an indispensable prerequisite, it is by the Vth amendment declared that "no *person* shall be held to *answer* for a *capital* 'or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or 'naval forces, or in the militia when in actual service, in time 'of war or public danger; * * * * nor be deprived of life, 'liberty, or property, without due process of law."

That murder is a *crime* no one will deny. It is a capital and infamous crime. It is a felony of the highest degree.

"*Presentment*," "*indictment*," and "*grand jury*," are terms of equally certain signification.

A military commission could in no sense fill the description of the one or the other. And it is impossible to bring Mr. Alford within the exception; for the offense was not a case "*arising in the land or naval forces, or in the militia when in actual service, in time of war or public danger.*" The *case*

was an offense *against* the laws of Texas. The accused were citizens of Texas, in no manner connected with the army or navy. Therefore, they could not be put upon trial in the absence of a presentment or indictment *found* by a grand jury of a court duly constituted under the Constitution and laws of the land.

And the amendments stop not here. The VIth declares that "in *ALL criminal prosecutions*, the accused shall enjoy the 'right to a speedy and *public trial* by an impartial *jury of the State and district wherein the crime shall have been committed*, 'which *district* shall have been *previously* ascertained by law, 'and to be informed of the nature and cause of the *accusation*; to be confronted with the witnesses against him; to 'have compulsory *process* for obtaining witnesses in his favor; 'and to have the assistance of *counsel* for his defense."

This Constitution is a law for rulers as well as people, equally in war and in peace, and covers with the shield of its protection all classes of men, at *all times* and under *all circumstances*. (*Ex parte* Milligan, 4 Wallace, 120, 121.)

I call your attention to the language of this opinion. It clearly holds these propositions: The Vth amendment recognized the necessity of an indictment or presentment, before any one can be held to answer for high crimes, with the exceptions therein stated; by which it was meant to limit the trial by jury, in this VIth amendment, to those persons who were subject to indictment or presentment in the Vth. Those connected with the military or naval service are amenable to the jurisdiction which Congress has created for their government, and while thus serving they surrender the right to be tried by the civil courts. *All other persons* are guaranteed *trial by jury*. *Civil liberty and martial law cannot endure together*; the antagonism is irreconcilable. Neither Congress nor the President can disturb one of these guarantees of liberty, except the one concerning the writ of *habeas corpus*.

I will not weary your Excellency with a number of author-

ities. I stand ready with these, should you submit the question to the law officers of the Government.

The Constitution is the supreme law of the land. It requires of you, in common with all other officers, an oath to support it, and, above all other officers, *to defend it*. And you have the high authority of Mr. Jefferson for saying, that when an application is presented to you for pardon, your first duty is to look to the Constitution, and to determine for yourself whether the law under which the party has been tried and convicted is warranted by the Constitution; and if, in your opinion, it be not warranted, it is your duty to pardon, irrespective of any question about the guilt or innocence of the party. That great man, in that same letter, (to Mrs. Adams,) assumed that members of Congress, and the President, in the first instance, must determine for themselves upon the constitutionality of laws passed and approved by them; and so must the courts, when they try and convict; but that on an application for pardon, the President must be governed by his own conscientious opinions in regard to the sacred instrument. (4 Jefferson's Works, pp. 556, 560, 561.)

In one of those letters Mr. Jefferson said, "I discharged 'every person under punishment or prosecution under the sedition law, because I considered and now consider that law 'to be a nullity, as absolute and as palpable as if Congress 'had ordered us to fall down and worship a golden image; and 'that it was as much my duty to arrest its execution in every 'stage, as it would have been to have rescued from the fiery furnace those who should have been cast into it for refusing to worship the image.'" (4 Jefferson's Works, p. 556.)

And in answer to the argument that it belongs to the judges to determine the constitutionality of a law, he says:

"You seem to think it devolved on the judges to decide on the validity of the sedition law. But nothing in the Constitution has given them a right to decide for the Executive, more than to the Executive to decide for them. Both magistrates are equally independent in the sphere of action assigned

to them. The judges, believing the law constitutional, had a right to pass a sentence of fine and imprisonment, because the power was placed in their hands by the Constitution. But the Executive, believing the law to be unconstitutional, were bound to remit the execution of it, because that power has been confided to them by the Constitution. That instrument meant that its co-ordinate branches should be checks on each other. But the opinion which gives to the judges the right to decide what laws are constitutional and what not, not only for themselves in their own sphere of action, but for the legislature and executive also, in their spheres, would make the judiciary a despotic branch."

Jefferson, the great apostle of liberty, the immortal author of the Declaration of Independence, was spared half a century after its promulgation. He never ceased to warn us of any approach towards the gulf of dissolution or the rock of consolidation. On the fiftieth anniversary his immortal spirit, with his compatriot, the head of another school, John Adams, was called to their better land. They had lived to learn that error is never dangerous while reason is left free to combat it; that statesmen may differ upon non-essentials; that, under all theories, the government is for the people, and that it can only be preserved by a jealous watchfulness over every citizen, and by enlarging, rather than circumscribing, the rights of the masses. From their graves these immortal apostles speak to you to-day; and they tell you that, as the Executive of this mighty nation, the Declaration of Independence and Constitution will perish if you permit one citizen to remain manacled with chains illegally forged.

I beg to remind you, in the memorable language of Queen Anne, on a notable occasion: "She could inflict no punishment 'upon any, the meanest of her subjects, unless warranted by 'the law of the land.'" And that warrant can only be found in the Constitution, and in the civil and criminal laws for citizens, and in the rules and articles of war for the government of soldiers and sailors. But these jurisdictions must be kept separate, or there is no safety for either.

You must judge for yourself of the jurisdiction and powers of the tribunals which tried these cases, but with no more power than I, or any other citizen, could confer upon them. This is a rule of universal application, whenever a question as to the jurisdiction of the court which tried the cause is presented. The proposition is plain and simple. If the military commission had no jurisdiction under the Constitution, its acts were nullities. Our court of the highest resort has several times thus enunciated the principle :

“This proposition (as to the conclusiveness of a judgment) is true in relation to every tribunal acting judicially, whilst acting within the sphere of their jurisdiction, where no appellate tribunal is created; and even when there is such an appellate power, the judgment is conclusive when it only comes collaterally into question, so long as it is unreversed. But directly the reverse of this is true in relation to the judgment of any court acting beyond the pale of its authority. The principle upon this subject is concisely and accurately stated by this court in the case of *Elliot et al. vs. Peirsol et al.*, (1 Pet., 340,) in these words: ‘Where a court has jurisdiction, it has a right to decide every question which occurs in the cause; and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. But if it act without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void.’ ” (*Wilcox vs. Jackson*, 13 Pet., 510, 511.)

This rule is as applicable to one class of officers and tribunals as another. The question of *power to render the judgment or to do the act* is always open whenever and wherever the record of the judgment is offered. The general rules are thus stated upon the highest judicial authority in Texas:

“The principle that a judgment of a court acting without authority is null seems to be of universal application. The only difference in its effect on the judgments of general and of specially limited jurisdiction is, that, in support of the former jurisdiction is presumed, while in the latter it must be shown; but whenever the want of *power* is made to appear, its legal effect is the same, whatever may be the *character of the jurisdiction*. (Cowan & Hill’s Notes, vol. 4, pp. 206, 214, and the

cases cited.) The cases are numerous in which the effect of a want of authority is enunciated; and it is thus perspicuously stated in *Elliot vs. Piersol*, (1 Pet., 328-340.) 'Where a court has jurisdiction, it has a right to decide every question which occurs in the cause; and, whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. But, if it act without authority, its judgments and orders are nullities. They are not voidable, but simply void, and form no bar to a recovery sought even prior to a reversal in opposition to them.'

"The appellant contends that a judgment of the supreme court, having general appellate jurisdiction, is conclusive, unless set aside before the expiration of the term, and that no court can look behind it; and in support of this position, refers to the case *ex parte Tobias Watkins*, (3 Pet., 193.) * *

There are repeated recognitions in the opinions of that court of the general rule as to the legal consequence of the want of power, whether the jurisdiction be general or special. In *Voorhies vs. The Bank of the United States*, (10 Pet., 474,) it is said, in substance, that the only difference between the supreme court and other courts is, that no court can revise the proceedings of the supreme court, but that that difference disappears after the time prescribed for a writ of error or appeal to revise those of an inferior court of the United States or of any State. They stand on the same footing in law. If not warranted by the Constitution or law of the land, the most solemn proceedings of the supreme court can confer no right, which is denied to any judicial act, *under color of law, which can properly be deemed to have been done coram non judice*; that is, by persons assuming the judicial function in the given case without lawful authority. In *Williamson et al. vs. Berry* (8 How., 540) it was declared, in the opinion of a majority of the court, to be a 'well-settled rule in jurisprudence that the jurisdiction of any court exercising authority over a subject may be inquired into in every other court, when the proceedings in the former are relied upon and brought before the latter by a party claiming the benefit of such proceedings. The rule prevails, whether the decree or judgment has been given in a court of admiralty, chancery, ecclesiastical court, or court of common law, or whether the point ruled has arisen under the laws of nations, the practice in chancery, or the municipal laws of States.' (3 Dall., 7; 4 Cranch, 241; 13 Pet., 499; 3

How., 750.) The rule thus stated is sufficiently broad to cover the judgments of *all courts, unless, indeed, there be a court whose jurisdiction is unlimited.*" (*Horan vs. Wahrenberger*, 9 Tex., 313, 319.)

I submit to your Excellency, for Mr. Alford, that this judgment of the military commission is without authority of law; that it is unconstitutional, null and void; and that, upon an application for pardon, it is not only the right, but the duty of your Excellency to meet these questions squarely, and to decide in accordance with the dictates of your own judgment; and, if you believe the law to be unconstitutional, to disregard the judgment.

Mr. President, I am aware that the power to thus try citizens of the United States is claimed under the third and fourth sections of "an act to provide for the more efficient government of the rebel States." The sections read thus:

"3. It shall be the duty of each officer assigned as aforesaid to protect all persons in their rights of person and property, to suppress insurrection, disorder, and violence, and to punish, or cause to be punished, all disturbers of the peace and criminals; and to this end he may allow local civil tribunals to take jurisdiction of and to try offenders, or, when in his judgment it may be necessary for the trial of offenders, he shall have power to organize military commissions or tribunals for that purpose, and all interference under color of State authority with the exercise of military authority under this act shall be null and void.

"4. All persons put under military arrest by virtue of this act shall be tried without unnecessary delay, and no cruel or unusual punishment shall be inflicted; and no sentence of any military commission or tribunal hereby authorized, affecting the life or liberty of any person, shall be executed until it is approved by the officer in command of the district, and the laws and regulations for the government of the army shall not be affected by this act, except in so far as they conflict with its provisions: *Provided*, That no sentence of death under the provisions of this act shall be carried into effect without the approval of the President."

This law does not create judicial tribunals inferior to the

Supreme Court of the United States; it creates no judicial tribunal or judicial district; it defines no crime; it creates no offense; prescribes no penalty. It speaks of "criminals" and "offenders," but gives no description of what they are; against what law or peace they have offended, or by what statute they are to be tried. There is as much power to organize other "tribunals" as "military commissions." Neither could be effected without the exercise of legislative power. But the sentences of the one and the other had to undergo the supervision and approval of the commanding general, and, in capital cases, of the President. And this brings us to the direct question, what is the military power of the President of the United States? The Constitution answers: "*The President shall be commander-in-chief of the army and navy of the United States, and of the militia of the several States when called into the actual service of the United States.*"

This is the alpha and omega, the beginning and end, of the whole matter. The Constitution limits the power to the "army and navy, and to the militia when in actual service." The law establishes a code for the government of these, but a different code for others. And the Constitution gives the President no power over the citizens disconnected with the army and navy, nor over the civil tribunals of the land. And, having no such power, the Congress could not confer it upon his subalterns.

I have not overlooked the great arguments growing out of the duration of the rebellion or the necessities of the war. I do not deny that every incidental power may be exercised to preserve the powers delegated by the Constitution, and concede all that is necessary for the restoration of republican government and the rehabilitation of the States. No one has given to these and to all the constitutional amendments a more hearty support. But we are not to forget the great cardinal principles, that the citizen, unconnected with the army or navy, cannot be denied the right of trial by jury, in

a judicial tribunal; that through all the struggle, the rebels never ceased to be citizens, answerable to the laws defining treason and crime against the United States, and they remained entitled to trials under the Constitution and in accordance with the prescribed laws; that the States never ceased to be States; and that all their governments were provisional, at least, with codes defining crimes, and civil courts to punish these crimes; and therefore there never could be a necessity for this undefined attempt to create a military jurisdiction in defiance of the Constitution, thus "affecting to render the military independent of and superior to the civil power."

We may admit the constitutionality of the reconstruction laws so far as they confer power to re-create States and confer suffrage and authority upon those who would restore the government and adopt the amendments, and at the same time deny the constitutionality of this criminal jurisdiction, and its exercise over citizens in a manner expressly forbidden.

The great object of these laws, and of certain preceding measures, was to secure the ratification of the XIIIth, XIVth, and XVth amendments to the Constitution. That has been done—happily and wisely done. Millions yet unborn will bless the work. But in perfecting that work, the first section of the XIVth amendment arrays itself against this exercise of military power:

"All persons *born or naturalized* in the United States, and subject to the jurisdiction thereof, are *citizens of the United States* and of the State wherein they reside. No State shall make or enforce any law which shall *abridge the privileges or immunities of citizens of the United States*; nor shall any State deprive any person of life, liberty, or property, *without due process of law*, nor deny to any person within its jurisdiction the *equal protection of the laws*."

This leaves no doubt of Mr. Alford's citizenship; and it denies the power to take away his liberty "*without due process of law*." This power had already been denied to the

national Government. And it had already been often defined to mean all the guaranties set forth in the Vth and VIth amendments. (Jones *v.* Montes, 15 Tex., 353; Jones *v.* Reynolds, 2 Tex., 251.)

"Nec super eum ibimus, nec super eum mittimus, nisi per legale iudicium, parium suorum, vel per legem terræ." ["Neither 'will we pass upon him, or condemn him, but by the lawful judgment of his peers or the law of the land."'] What law? Undoubtedly a pre-existing rule of conduct, not an *ex post facto* law, rescript, or decree made for the occasion—the purpose of working the wrong. (See the authorities collected in Paschal's Annotated Constitution, Note 257, p. 260.)

Mr. President, I feel that that little book, which will outlive me, would deserve to be consigned to infamy, with its author, could I allow this day to pass without entering my solemn protest against the longer incarceration of citizens under a proceeding which violates every principle of that Constitution and every authority cited in the commentaries.

I can no more be silent while the Constitution is being trampled upon by the Federal authorities in time of peace, than I could while it was being subverted by the Confederate authorities in time of war.

There is a petition before you, signed by many leading Republicans of Texas, beseeching the exercise of your Executive clemency. There is a report of the judge advocate who tried the cause, indorsed, I am told, by the Judge Advocate General, in which it is said that the guilt of Mr. Alford is not satisfactorily proved. I am told that there is also a petition of Texas officials against the pardon. I have read none of the papers but the first, and that I read to your Excellency when I called with the son of the prisoner. I know that your Excellency's kind heart was then strongly moved towards mercy. God forgive the men who thrust themselves between the suffering man, kneeling at the footstool of power, surrounded, as he was, by an aged and weeping wife and heart-

broken children, and imploring the head of the nation for forgiveness of a supposed offense, with which he is charged, but for which he had never been lawfully tried or duly convicted. That man holds up to you the Constitution of his country, and demands of his accusers to try him before a tribunal known to the law. These men, who can know nothing of the proof, who can make no argument in favor of the power of the tribunal which tried him, for purposes known only to themselves, seek to silence the voice of mercy, and to prevent that examination which must establish that, upon the supreme law and the evidence, justice would require the annulment of the sentence. But let none complain. Three thousand protestants cried aloud at once, at the throne of Pontius Pilate, and secured the crucifixion of the God-man, of whom the judge was obliged to say, "I find in him no fault at all!"

I put this case upon a ground as sacred and holy as any laws, save those given by the great Fountain of mercy and justice. I plead for a Constitution violated, a Declaration of Independence outraged, a country bleeding and distracted, because our rulers have not returned to the plain landmarks of protection and liberty guaranteed. And I demand that no avengers of blood shall be heard or heeded against this prayer.

Only the other day those protestants against mercy, those Texas advocates of military power, passed a law authorizing the declaration of martial law, military rule, military commissions, suspension of the writ of *habeas corpus* and civil law, and the arbitrary levy of taxes, worse than the ship-money of James, by a despotic governor. These things and a nation of liberty cannot survive together. They portend despotism, anarchy, and ruin. Your position enables you to establish a precedent in favor of the Constitution. The time has come; the States have been restored; the pretended law under which this party was imprisoned has accomplished its work, and has expired and become obsolete. The power to convoke

such another tribunal has ceased, and, I trust, forever. Therefore, there can be no excuse for asking us to make a judicial case, were that possible or desirable, and it is not. Nay, such a precedent has been avoided by every possible device. As in Yerger's case, which did your Excellency honor, the parties could be turned over to the civil authorities of Texas.

In the name of the Constitution, of justice, of mercy, and of liberty prostrated, I implore you to order the discharge of Alford, and of all others imprisoned under this law.

I remain, very respectfully,

GEO. W. PASCHAL.

NOTE.—Shortly after this letter the President pardoned all persons imprisoned by sentence of military commissions, but he is not known to have given any written opinion; nor is it known how far he adopted the arguments in this letter. The precedent is of sufficient value to authorize the publication of this appeal to the President.

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TABLE OF AUTHORITIES CITED AND ABBREVIATIONS USED.

Ab. on Ship.....	Abbot on Shipping.
Adams.....	John Adams' Defense of the American Constitution.
Adams Rom. Ant.....	Adams' Roman Antiquities.
Allen.....	Allen's (Mass.) Reports.
Ala.....	Alabama Reports.
Am. Almanac.....	American Almanac.
Am. Almanac Rep.....	American Almanac Repository.
Am. Jur.....	American Jurist.
Am. Lead. C.....	American Leading Cases.
Am. L. J.....	American Law Journal.
Am. L. R.....	American Law Register;
And. Rev. L.....	Andrew's Revenue Laws.
Ang. on Tidewaters.....	Angel on Tidewaters.
Ang. and Ames.....	Angel and Ames on Corporations.
Archbold's Law of Bankruptcy.	
Ash.—Ashm.....	Ashmead's Reports.
Bacon's Ab.....	Bacon's Abridgment.
Bailey.....	Bailey's Reports.
Bald. C. C.....	Baldwin's Circuit Court Reports.
Barb.....	Barbour's Reports.
Barnes.....	Barnes' Cases of Practice.
Barr.....	Barr's Pennsylvania State Reports.
Bates.....	Attorney-General, Edward Bates.
Benton's Debates.....	Benton's Condensed Congressional Debates.
Benton's Thirty Years in the Senate.	
Bing.....	Bingham's Reports.
Binn.....	Binney's Reports.
Bevan.....	Bevan's Reports.
Bioren and Duane's Laws of the United States.	
Bishop on Cr. L.....	Bishop on Criminal Law.
Black.....	Black's Reports.
Blackf.....	Blackford's Reports.
Bl.—Bl. Com.....	Blackstone's Commentaries.
Blackwood.....	Blackwood's Reports.
Blatch.....	Blatchford's Reports.
Blount's Trial.	
Breese.....	Breese's Reports.
Brightly.....	Brightly's Reports.
Brightly's Dig.....	Brightly's Digest of Laws of U. S.
Brock.....	Brockenborough's Reports.
Burr's Trial.	

Burr.—Bur.....	Burrow's Reports.
Bynkershoek.....	Bynkershoek on War.
Caine.....	Caine's Cases in Error.
Calhoun's Essay on Government.	
Cal.....	California Reports.
Call.....	Call's Reports.
Camp.....	Campbell's Reports.
Carth.....	Carthew's Reports.
Casey.....	Casey's Pennsylvania State Reports.
Chase's Trial.	
Chev.....	Cheve's Reports.
Ch. Pl.....	Chitty's Pleadings.
Cicero pro Sulla.....	Cicero's Oration for Sulla.
Clark & Finnell.....	Clark and Finnelly's Reports.
Cl. & Hall.....	Clark and Hall's Reports.
Cobb.....	Cobb on Slavery.
Cobbett's Parliamentary History.	
Coke.....	Coke's Reports.
Co. Litt.....	Coke on Littleton.
Coldwell.....	Coldwell's Reports.
Comst.....	Comstock's Reports.
Com. Dig.....	Comyn's Digest.
Cond.....	Peters's Condensed Reports.
Conn.....	Connecticut Reports.
Cow.....	Cowen's Reports.
Crabbe.....	Crabbe's Reports.
Cr.....	Cranch's Reports.
Cr. C. C.....	Cranch's Circuit Court Reports.
Curt. C. C.....	Curtis' Circuit Court Reports.
Curt. Com.....	Curtis' Commentaries.
Curt. Hist.....	Curtis' History of the Constitution.
Curtis' Law of Patents.	
Cush.....	Cushing's Reports.
Dall.....	Dallas' Reports.
Daveis.....	Daveis' Reports.
De Lolme.....	De Lolme's Works.
Den.....	Denio's Reports.
Dev.....	Devereux's Reports.
Dev. & Bat.....	Devereux and Battle's Reports.
Doug.....	Douglass's Reports.
Duane.....	Duane's American Law.
Duer.....	Duer's Reports.
Duval.....	Judge Thomas H. Duval.
Duval.....	Duval's Reports.
Dyer.....	Dyer's Reports.
East.....	East's Report's.
Elliot's Deb.....	Elliot's Debates.
Eng. L. and Eq.....	English Law and Equity.
Farrar.....	Farrar on the Constitution.
Federalist.	
Finch.....	Finch's Reports.
Fort.....	Fortescue's Reports.

Ga.....	Georgia Reports.
Gill.....	Gillman's Reports.
Gr.....	Greene's Reports.
Gray.....	Gray's Reports.
Greenlf. Ev.....	Greenleaf's Evidence.
H. & McH.....	Harris and McHenry's Reports.
Hagg.....	Haggard's Reports.
Hale P. C.....	Hale's Pleas of the Crown.
Hall L. J.....	Hall's Law Journal.
Hall's Journal.....	Hall's Journal of Jurisprudence.
Halleck.....	Halleck's International Law.
Halst.....	Halsted's Reports.
Hare.....	Hare's Reports.
Harg.....	Hargrave's State Trials.
Harp.....	Harper's Reports.
Harring.—Harrington...	Harrington's Reports.
Hawk.....	Hawk's Reports.
Hawkins.....	Hawkins's Pleas of the Crown.
Hayw.....	Hayward's Reports.
Hemphill's Report on Internal Improvements.	
Hemp.....	Hempstead's Reports.
Hickey's Const.....	Hickey's Constitution.
Hill.....	Hill's N. Y. Reports.
Hough's Convention Manual of State Constitutions.	
How....	Howard's Reports.
Humph.....	Humphrey's Reports.
Hutch.'s Hist.....	Hutching's History of New England.
Ill. R.....	Illinois Reports.
Ind. Rep.....	Indiana Reports.
Ing. on <i>Hab. Corp.</i>	Ingersoll on <i>Habeas Corpus</i> .
Ired.....	Iredell's Reports.
Jefferson's Manual.	
Jeff. Corresp.....	Jefferson's Correspondence.
Johns.....	Johnson's Reports.
Johns. Ch.....	Johnson's Chancery Reports.
Journal of Convention.	
Journal of the Senate.	
Journal of the House.	
Kent.—Kent's Com.....	Kent's Commentaries.
Kentucky Resolutions.	
Kern.—Kernal.....	Kernan's Reports.
Kirby.....	Kirby's Reports.
Law Mag.....	Law Magazine.
Legal Int.....	Legal Intelligencer.
Legaré.....	Attorney-General Legaré.
Leigh.....	Leigh's Reports.
Lewis, Commissioner of Internal Revenue.	
Lieber.....	Lieber's Encyclopedia Americana.
Litt.....	Littell's Reports.
Littleton.....	Coke on Littleton.
Lloyd's Debates.	
Lord King's Life of Locke.	

M. and Sel.....	Maule and Selwyn's Reports.
Mackeld's Civ. L.....	Mackeld's Civil Law.
<i>Magna Charta.</i>	
Marshall's Life of Washington.	
Mas.—Mas. C. C.....	Mason's Circuit Court Reports.
Mass.....	Massachusetts Reports.
McAllister.....	McAllister's Reports.
McLean.....	McLean's Reports.
Md.....	Maryland Reports.
Meigs.....	Meigs's Reports.
Met.....	Metcalf's Reports.
Miles.....	Miles's Reports.
Minn.....	Minnesota Reports.
Miss.....	Mississippi Reports.
Mo.....	Missouri Reports.
Monr.....	Monroe's Reports.
Mont.—Montesq.....	Montesquieu's Spirit of Laws.
Moore Privy Council....	Moore's Privy Council Reports.
Mumf.....	Mumford's Reports.
N. H.	New Hampshire Reports.
N. Y. <i>Herald.</i>	New York <i>Herald.</i>
N. Y. Reports.	New York Reports.
O. Bridge Reports	Sir Oliver Bridge's Reports.
O.....	Ohio Reports.
Op.....	Opinions of the Attorney-General.
Paige.....	Paige's Reports.
Paine.....	Paine's Reports.
Paschal's Annotated Digest of the Laws of Texas.	
Peake.....	Peake's Cases.
Penn.....	Pennington's Reports.
Penn. L. J.....	Pennsylvania Law Journal.
Penn. State.....	Pennsylvania State Reports.
Pet.....	Peters's Reports.
Pet. C. C.....	Peters's Circuit Court Reports.
Phila. R.....	Philadelphia Reports.
Philadelphia <i>Ledger.</i>	
Phillimore.....	Phillimore's International Law.
Pick.....	Pickering's Reports.
Pitk.....	Pitkin's History of the United States.
Pittsburg L. J.....	Pittsburg Legal Journal.
Port.....	Porter's Reports.
Puffendorf.....	Puffendorf's Works.
Randolph.	Randolph's Reports.
Rawle.....	Rawle's Reports.
Rawle's Const.....	Rawle on the Constitution.
Rich.....	Richardson's Reports.
Salkeld.....	Salkeld's Reports.
Sandf.....	Sandford's Reports.
S. C.....	Same Case.
Scam.....	Scammon's Reports.
Sedgwick on Statutory and Constitutional Law.	
Seld.....	Selden's Reports.

Senate Journal.	
Serg. Const.....	Sergeant on the Constitution.
S. & R.....	Sergeant and Rawle's Reports.
Shep.	Shepley's Reports.
Shepherd.....	Shepherd's Touchstone.
Smith.....	Smith's (Penn.) Reports.
Smith's Leading Cases	
Smith's Wealth of Nations.	
So. Car.....	South Carolina Reports.
Speed.....	Attorney-General, James Speed.
Spelman.....	Spelman's Works.
Stanbery	Attorney-General, Henry Stanbery
Stewart	Stewart's Reports.
Stanton	Attorney-General, Edwin Stanton.
Story	Story's Reports.
Story's Confl. of L.....	Story's Conflict of Laws.
Story's Const.....	Story on the Constitution.
Story on Cont.....	Story on Contracts.
Strange.....	Strange's Reports.
Sumner's	Sumner's Reports.
Taylor's Civil Law.	
Tex.....	Texas Reports.
Thatcher Cr. C.....	Thatcher's Criminal Cases.
Tomlin's Law Dic.....	Tomlin's Law Dictionary.
Tucker's Black. App.....	Tucker's Blackstone, Appendix.
Vallandigham's Trial.	
Vattel's Law of Nations.	
Verm. R.—Vt. R.....	Vermont Reports.
Vern.....	Vernon's Reports.
Ves.....	Vesey's Reports.
Vesey, Jr.....	Vesey, Jr.'s, Reports.
Virginia Resolutions and Report.	
Walker.....	Walker's Report.
Wall.....	Wallace's Reports.
Wall, Jr.....	Wallace, Jr.'s, Reports.
Wash. C. C.....	Washington Circuit Court Reports.
Watts	Watts Reports.
Webster's Dic.....	Webster's Dictionary.
Webster's Speeches.	
Wend.....	Wendell's Reports.
Western Leg. Obsr.....	Western Legal Observer.
Wharton La.....	Wharton's Criminal Law.
Wharton on Homicides.	
Wh.—Wheat.....	Wheaton's Reports.
Wheaton's Life of Pinckney.	
Wheat. Int. L.....	Wheaton's International Law.
Wheeler's Law of Slavery.	
Whiting.....	Whiting on the War Power.
Wil. M. C.....	Wilcock on Municipal Corporations.
Wils. Law Lect.....	Wilson's Law Lectures.
Will.....	Wille's Reports.
Wirt.....	Attorney-General, William Wirt.

Wis. R. Wisconsin Reports.
Woodeson's Lectures.
Worcester's Dic. Worcester's Dictionary.
World Almanac.
Yelv. Yelverton's Reports.
Yerg. Yerger's Reports.
Zab. R. Zabriskie's Reports.

THE DECLARATION OF INDEPENDENCE.

A Declaration by the Representatives of the United States of America, in Congress assembled.

WHEN, in the course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume, among the powers of the earth, the separate and equal station to which the laws of nature and of nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

We hold these truths to be self-evident, that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these, are life, liberty, and the pursuit of happiness. That, to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed; that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute a new government, laying its foundation on such principles, and organizing its powers in such

form, as to them shall seem most likely to effect their safety and happiness. Prudence, indeed, will dictate that governments long established, should not be changed for light and transient causes ; and, accordingly, all experience hath shown, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But, when a long train of abuses and usurpations, pursuing invariably the same object, evinces a design to reduce them under absolute despotism, it is their right, it is their duty, to throw off such government, and to provide new guards for their future security. Such has been the patient sufferance of these colonies, and such is now the necessity which constrains them to alter their former systems of government. The history of the present king of Great Britain is a history of repeated injuries and usurpations, all having, in direct object, the establishment of an absolute tyranny over these States. To prove this, let facts be submitted to a candid world :

He has refused his assent to laws the most wholesome and necessary for the public good.

He has forbidden his Governors to pass laws of immediate and pressing importance, unless suspended in their operation till his assent should be obtained ; and, when so suspended, he has utterly neglected to attend to them.

He has refused to pass other laws for the accommodation of large districts of people, unless those

people would relinquish the right of representation in the legislature ; a right inestimable to them, and formidable to tyrants only.

He has called together legislative bodies at places unusual, uncomfortable, and distant from the depository of their public records, for the sole purpose of fatiguing them into compliance with his measures.

He has dissolved representative houses repeatedly, for opposing, with manly firmness, his invasions on the rights of the people.

He has refused, for a long time after such dissolutions, to cause others to be elected ; whereby the legislative powers, incapable of annihilation, have returned to the people at large for their exercise ; the State remaining, in the mean time, exposed to all the danger of invasion from without, and convulsions within.

He has endeavored to prevent the population of these States ; for that purpose, obstructing the laws for naturalization of foreigners ; refusing to pass others to encourage their migration hither, and raising the conditions of new appropriations of lands.

He has obstructed the administration of justice, by refusing his assent to laws for establishing judiciary powers.

He has made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries.

He has erected a multitude of new offices, and sent

hither swarms of officers to harass our people, and eat out their substance.

He has kept among us, in times of peace, standing armies, without the consent of our legislature.

He has affected to render the military independent of, and superior to, the civil power.

He has combined, with others, to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws; giving his assent to their acts of pretended legislation :

For quartering large bodies of armed troops among us :

For protecting them, by a mock trial, from punishment, for any murders which they should commit on the inhabitants of these States :

For cutting off our trade with all parts of the world :

For imposing taxes on us without our consent :

For depriving us, in many cases, of the benefits of trial by jury :

For transporting us beyond the seas to be tried for pretended offenses :

For abolishing the free system of English laws in a neighboring province, establishing therein an arbitrary government, and enlarging its boundaries, so as to render it at once an example and fit instrument for introducing the same absolute rule into these colonies :

For taking away our charters, abolishing our most valuable laws, and altering, fundamentally, the powers of our governments :

For suspending our own legislatures, and declaring themselves invested with power to legislate for us in all cases whatsoever.

He has abdicated government here, by declaring us out of his protection, and waging war against us.

He has plundered our seas, ravaged our coasts, burnt our towns, and destroyed the lives of our people.

He is, at this time, transporting large armies of foreign mercenaries to complete the works of death, desolation, and tyranny, already begun, with circumstances of cruelty and perfidy scarcely paralleled in the most barbarous ages, and totally unworthy the head of a civilized nation.

He has constrained our fellow-citizens, taken captive on the high seas, to bear arms against their country, to become the executioners of their friends and brethren, or to fall themselves by their hands.

He has excited domestic insurrection amongst us, and has endeavored to bring on the inhabitants of our frontiers, the merciless Indian savages, whose known rule of warfare is an undistinguished destruction of all ages, sexes, and conditions.

In every stage of these oppressions, we have petitioned for redress, in the most humble terms; our repeated petitions have been answered only by repeated injury. A prince, whose character is thus marked by every act which may define a tyrant, is unfit to be the ruler of a free people.

Nor have we been wanting in attention to our British brethren. We have warned them, from time to time, of attempts made by their legislature to extend an unwarrantable jurisdiction over us. We have reminded them of the circumstances of our emigration and settlement here. We have appealed to their native justice and magnanimity, and we have conjured them, by the ties of our common kindred, to disavow these usurpations, which would inevitably interrupt our connections and correspondence. They, too, have been deaf to the voice of justice and consanguinity. We must, therefore, acquiesce in the necessity, which denounces our separation, and hold them, as we hold the rest of mankind, enemies in war, in peace, friends.

We, therefore, the representatives of the UNITED STATES OF AMERICA, in GENERAL CONGRESS assembled, appealing to the Supreme Judge of the World for the rectitude of our intentions, do, in the name, and by the authority of the good people of these colonies, solemnly publish and declare, That these United Colonies are, and of right ought to be, FREE AND INDEPENDENT STATES; that they are absolved from all allegiance to the British crown, and that all political connection between them and the State of Great Britain, is, and ought to be, totally dissolved; and that, as *FREE AND INDEPENDENT STATES*, they have full power to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things which INDEPENDENT

STATES may of right do. And for the support of this declaration, with a firm reliance on the protection of DIVINE PROVIDENCE, we mutually pledge to each other, our lives, our fortunes, and our sacred honor

The foregoing declaration was, by order of Congress, engrossed, and signed by the following members:—

JOHN HANCOCK.

New Hampshire.

Josiah Bartlett,
William Whipple,
Matthew Thornton.

Massachusetts Bay.

Samuel Adams,
John Adams,
Robert Treat Paine,
Elbridge Gerry.

Rhode Island.

Stephen Hopkins,
William Ellery.

Connecticut.

Roger Sherman,
Samuel Huntington,
William Williams,
Oliver Wolcott.

New York.

William Floyd,
Philip Livingston,
Francis Lewis,
Lewis Morris.

New Jersey.

Richard Stockton,
John Witherspoon,
Francis Hopkinson,

John Hart,
Abraham Clark.

Pennsylvania.

Robert Morris,
Benjamin Rush,
Benjamin Franklin,
John Morton,
George Clymer,
James Smith,
George Taylor,
James Wilson,
George Ross.

Delaware.

Cæsar Rodney,
George Read,
Thomas M'Kean.

Maryland.

Samuel Chase,
William Paca,
Thomas Stone,
Charles Carroll, of Carrollton.

Virginia.

George Wythe,
Richard Henry Lee,
Thomas Jefferson,
Benjamin Harrison,

Virginia.

Thomas Nelson, Jr.,
Francis Lightfoot Lee,
Carter Braxton.

North Carolina.

William Hooper,
Joseph Hewes,
John Penn.

South Carolina.

Edward Rutledge,
Thomas Heyward, Jr.,
Thomas Lynch, Jr.,
Arthur Middleton.

Georgia.

Button Gwinnett,
Lyman Hall,
George Walton.

Resolved, That copies of the Declaration be sent to the several assemblies, conventions, and committees, or councils of safety, and to the several commanding officers of the continental troops; that it be proclaimed in each of the United States, and at the head of the army.

ARTICLES OF CONFEDERATION AND PERPETUAL UNION BETWEEN THE STATES.

The following have been critically compared with the original Articles of Confederation in the Department of State, and found to conform minutely to them in text, letter, and punctuation. It may therefore be relied upon as a true copy.

TO ALL TO WHOM THESE PRESENTS SHALL COME, WE THE UNDERSIGNED DELEGATES OF THE STATES AFFIXED TO OUR NAMES, SEND GREETING.—Whereas the Delegates of the United States of America in Congress assembled did on the 15th day of November in the Year of our Lord 1777, and in the Second Year of the Independence of

America agree to certain articles of Confederation and perpetual Union between the States of New Hampshire, Massachusetts-bay, Rhode-island and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina, and Georgia, in the words following, viz.

“ARTICLES OF CONFEDERATION AND PERPETUAL UNION BETWEEN THE STATES OF NEW HAMPSHIRE, MASSACHUSETTS-BAY, RHODE-ISLAND AND PROVIDENCE PLANTATIONS, CONNECTICUT, NEW-YORK, NEW-JERSEY, PENNSYLVANIA, DELAWARE, MARYLAND, VIRGINIA, NORTH-CAROLINA, SOUTH-CAROLINA, AND GEORGIA.

ARTICLE I. The Stile of this confederacy shall be “The United States of America.”

ARTICLE II. Each state retains its sovereignty, freedom and independence, and every Power, Jurisdiction and right, which is not by this confederation expressly delegated to the united states, in congress assembled.

ARTICLE III. The said states hereby severally enter into a firm league of friendship with each other, for their common defence, the security of their Liberties, and their mutual and general welfare, binding themselves to assist each other, against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretence whatever.

ARTICLE IV. The better to secure and perpetuate mutual friendship and intercourse among the people of the different states in this union, the free inhabitants of each of these states, paupers, vagabonds, and fugitives from Justice excepted, shall be entitled to all privileges and immunities of free citizens in the several states; and the people of each state shall have free ingress and regress to and from any other state, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively, provided that such restriction shall not extend so far as to prevent the removal of property imported into any state, to any other state of which the Owner is an inhabitant; provided also that no imposition, duties or restriction shall be laid by any state, on the property of the united states, or either of them.

If any person guilty of, or charged with treason, felony, or other high misdemeanor in any state, shall flee from Justice, and be found in any of the united states, he shall upon demand of the Governor or executive power, of the state from which he fled, be delivered up and removed to the state having jurisdiction of his offence.

Full faith and credit shall be given in each of these states to the records, acts and judicial proceedings of the courts and magistrates of every other state.

ARTICLE V. For the more convenient management of the general interest of the united states, delegates shall be annually appointed in such manner as the legislature of each state shall direct, to meet in congress on the first Monday in November, in every year, with a power reserved to each state, to recal its delegates, or

any of them, at any time within the year, and to send others in their stead, for the remainder of the Year.

No state shall be represented in congress by less than two, nor by more than seven members; and no person shall be capable of being a delegate for more than three years in any term of six years; nor shall any person, being a delegate, be capable of holding any office under the united states, for which he, or another for his benefit receives any salary, fees or emolument of any kind.

Each state shall maintain its own delegates in any meeting of the states, and while they act as members of the committee of the states.

In determining questions in the united states, in congress assembled, each state shall have one vote.

Freedom of speech and debate in congress shall not be impeached or questioned in any Court, or place out of congress, and the members of congress shall be protected in their persons from arrests and imprisonments, during the time of their going to and from, and attendance on congress, except for treason, felony, or breach of the peace.

ARTICLE VI. No state without the Consent of the united states in congress assembled, shall send any embassy to, or receive any embassy from, or enter into any conference, agreement, alliance or treaty with any King prince or state; nor shall any person holding any office of profit or trust under the united states, or any of them, accept of any present, emolument, office or title of any kind whatever from any king, prince or foreign state; nor shall the united states in congress assembled, or any of them, grant any title of nobility.

No two or more states shall enter into any treaty,

confederation or alliance whatever between them, without the consent of the united states in congress assembled, specifying accurately the purposes for which the same is to be entered into, and how long it shall continue.

No state shall lay any imposts or duties, which may interfere with any stipulations in treaties, entered into by the united states in congress assembled, with any king, prince or state, in pursuance of any treaties already proposed by congress, to the courts of France and Spain.

No vessels of war shall be kept up in time of peace by any state, except such number only, as shall be deemed necessary by the united states in congress assembled, for the defence of such state, or its trade; nor shall any body of forces be kept up by any state, in time of peace, except such number only, as in the judgment of the united states, in congress assembled, shall be deemed requisite to garrison the forts necessary for the defence of such state; but every state shall always keep up a well regulated and disciplined militia, sufficiently armed and accoutred, and shall provide and have constantly ready for use, in public stores, a due number of field pieces and tents, and a proper quantity of arms, ammunition and camp equipage.

No state shall engage in any war without the consent of the united states in congress assembled, unless such state be actually invaded by enemies, or shall have received certain advice of a resolution being formed by some nation of Indians to invade such state, and the danger is so imminent as not to admit of a delay, till the united states in congress assembled can be consulted: nor shall any state grant commis-

sions to any ships or vessels of war, nor letters of marque or reprisal, except it be after a declaration of war by the united states in congress assembled, and then only against the kingdom or state and the subjects thereof, against which war has been so declared, and under such regulations as shall be established by the united states in congress assembled, unless such state be infested by pirates, in which case vessels of war may be fitted out for that occasion, and kept so long as the danger shall continue, or until the united states in congress assembled shall determine otherwise.

ARTICLE VII. When land-forces are raised by any state for the common defence, all officers of or under the rank of colonel, shall be appointed by the legislature of each state respectively by whom such forces shall be raised, or in such manner as such state shall direct, and all vacancies shall be filled up by the state which first made the appointment.

ARTICLE VIII. All charges of war, and all other expenses that shall be incurred for the common defence or general welfare, and allowed by the united states in congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several states, in proportion to the value of all land within each state, granted to or surveyed for any Person, as such land and the buildings and improvements thereon shall be estimated according to such mode as the united states in congress assembled, shall from time to time, direct and appoint. The taxes for paying that proportion shall be laid and levied by the authority and direction of the legislatures of the several states within the time agreed upon by the united states in congress assembled.

ARTICLE IX. The united states in congress assembled, shall have the sole and exclusive right and power of determining on peace and war, except in the cases mentioned in the sixth article—of sending and receiving ambassadors—entering into treaties and alliances, provided that no treaty of commerce shall be made whereby the legislative power of the respective states shall be restrained from imposing such imposts and duties on foreigners, as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatsoever—of establishing rules for deciding in all cases, what captures on land or water shall be legal, and in what manner prizes taken by land or naval forces in the service of the united states shall be divided or appropriated—of granting letters of marque and reprisal in times of peace—appointing courts for the trial of piracies and felonies committed on the high seas and establishing courts for receiving and determining finally appeals in all cases of captures, provided that no member of congress shall be appointed a judge of any of the said courts.

The united states in congress assembled shall also be the last resort on appeal in all disputes and differences now subsisting or that hereafter may arise between two or more states concerning boundary, jurisdiction or any other cause whatever ; which authority shall always be exercised in the manner following. Whenever the legislative or executive authority or lawful agent of any state in controversy with another shall present a petition to congress, stating the matter in question and praying for a hearing, notice thereof shall be given by order of congress to the legislative or executive author-

ity of the other state in controversy, and a day assigned for the appearance of the parties by their lawful agents, who shall then be directed to appoint by joint consent, commissioners or judges to constitute a court for hearing and determining the matter in question : but if they cannot agree, congress shall name three persons out of each of the united states, and from the list of such persons each party shall alternately strike out one, the petitioners beginning, until the number shall be reduced to thirteen ; and from that number not less than seven, nor more than nine names as congress shall direct, shall in the presence of congress be drawn out by lot, and the persons whose names shall be so drawn or any five of them, shall be commissioners or judges, to hear and finally determine the controversy, so always as a major part of the judges who shall hear the cause shall agree in the determination : and if either party shall neglect to attend at the day appointed, without showing reasons, which congress shall judge sufficient, or being present shall refuse to strike, the congress shall proceed to nominate three persons out of each state, and the secretary of congress shall strike in behalf of such party absent or refusing ; and the judgment and sentence of the court to be appointed, in the manner before prescribed, shall be final and conclusive ; and if any of the parties shall refuse to submit to the authority of such court, or to appear or defend their claim or cause, the court shall nevertheless proceed to pronounce sentence, or judgment, which shall in like manner be final and decisive, the judgment or sentence and other proceedings being in either case transmitted to congress, and lodged among the acts of congress for the security of the parties concerned : provided that every commis-

sioner, before he sits in judgment, shall take an oath to be administered by one of the judges of the supreme or superior court of the state, where the cause shall be tried, “well and truly to hear and determine the matter in question, according to the best of his judgment, without favour, affection or hope of reward :” provided also that no state shall be deprived of territory for the benefit of the united states.

All controversies concerning the private right of soil claimed under different grants of two or more states, whose jurisdictions as they may respect such lands, and the states which passed such grants are adjusted, the said grants or either of them being at the same time claimed to have originated antecedent to such settlement of jurisdiction, shall on the petition of either party to the congress of the united states, be finally determined as near as may be in the same manner as is before prescribed for deciding disputes respecting territorial jurisdiction between different states.

The united states in congress assembled shall also have the sole and exclusive right and power of regulating the alloy and value of coin struck by their own authority, or by that of the respective states—fixing the standard of weights and measures throughout the United States—regulating the trade and managing all affairs with the Indians, not members of any of the states, provided that the legislative right of any state within its own limits be not infringed or violated—establishing or regulating post-offices from one state to another, throughout all the united states, and exacting such postage on the papers passing thro’ the same as may be requisite to defray the expenses of the said office—appointing all officers of the land forces, in the

service of the united states, excepting regimental officers—appointing all the officers of the naval forces, and commissioning all officers whatever in the service of the united states—making rules for the government and regulation of the said land and naval forces, and directing their operations.

The united states in congress assembled shall have authority to appoint a committee, to sit in the recess of congress, to be denominated “ A Committee of the States,” and to consist of one delegate from each state ; and to appoint such other committees and civil officers as may be necessary for managing the general affairs of the united states under their direction—to appoint one of their number to preside, provided that no person be allowed to serve in the office of president more than one year in any term of three years ; to ascertain the necessary sums of Money to be raised for the service of the united states, and to appropriate and apply the same for defraying the public expenses—to borrow money, or emit bills on the credit of the united states, transmitting every half year to the respective states an account of the sums of money so borrowed or emitted,—to build and equip a navy—to agree upon the number of land forces, and to make requisitions from each state for its quota, in proportion to the number of white inhabitants in such state ; which requisition shall be binding, and thereupon the legislature of each state shall appoint the regimental officers, raise the men and cloath, arm and equip them in a soldier like manner, at the expense of the united states ; and the officers and men so cloathed, armed and equipped shall march to the place appointed, and within the time agreed on by the united states in congress assembled : But if the

united states in congress assembled shall, on consideration of circumstances judge proper that any state should not raise men, or should raise a smaller number than its quota, and that any other state should raise a greater number of men than the quota thereof, such extra number shall be raised, officered, cloathed, armed and equipped in the same manner as the quota of such state, unless the legislature of such state shall judge that such extra number cannot be safely spared out of the same, in which case they shall raise, officer, cloath, arm and equip as many of such extra number as they judge can be safely spared. And the officers and men so cloathed, armed and equipped, shall march to the place appointed, and within the time agreed on by the united states in congress assembled.

The united states in congress assembled shall never engage in a war, nor grant letters of marque and reprisal in time of peace, nor enter into any treaties or alliances, nor coin money, nor regulate the value thereof, nor ascertain the sums and expenses necessary for the defence and welfare of the united states, or any of them, nor emit bills, nor borrow money on the credit of the united states, nor appropriate money, nor agree upon the number of vessels of war, to be built or purchased, or the number of land or sea forces to be raised, nor appoint a commander in chief of the army or navy, unless nine states assent to the same: nor shall a question on any other point, except for adjourning from day to day be determined, unless by the votes of a majority of the united states in congress assembled.

The Congress of the united states shall have power to adjourn to any time within the year, and to any place within the united states, so that no period of

adjournment be for a longer duration than the space of six months, and shall publish the Journal of their proceedings monthly, except such parts thereof relating to treaties, alliances or military operations, as in their judgment require secrecy ; and the yeas and nays of the delegates of each state on any question shall be entered on the Journal, when it is desired by any delegate ; and the delegates of a state, or any of them, at his or their request shall be furnished with a transcript of the said Journal, except such parts as are above excepted, to lay before the legislatures of the several states.

ARTICLE X. The committee of the states, or any nine of them, shall be authorized to execute, in the recess of congress, such of the powers of congress as the united states in congress assembled, by the consent of nine states, shall from time to time think expedient to vest them with ; provided that no power be delegated to the said committee, for the exercise of which, by the articles of confederation, the voice of nine states in the congress of the united states assembled is requisite.

ARTICLE XI. Canada acceding to this confederation, and joining in the measures of the united states, shall be admitted into, and entitled to all the advantages of this union : but no other colony shall be admitted into the same, unless such admission be agreed to by nine states.

ARTICLE XII. All bills of credit emitted, monies borrowed and debts contracted by, or under the authority of congress, before the assembling of the united states, in pursuance of the present confederation, shall be deemed and considered as a charge against the united

states, for payment and satisfaction whereof the said united states, and the public faith are hereby solemnly pledged.

ARTICLE XIII. Every state shall abide by the determinations of the united states in congress assembled, on all questions which by this confederation is submitted to them. And the Articles of this confederation shall be inviolably observed by every state, and the union shall be perpetual ; nor shall any alteration at any time hereafter be made in any of them ; unless such alteration be agreed to in a congress of the united states, and be afterwards confirmed by the legislatures of every state.

And Whereas it hath pleased the Great Governor of the World to incline the hearts of the legislatures we respectively represent in congress, to approve of, and to authorize us to ratify the said articles of confederation and perpetual union. Know Ye that we the undersigned delegates, by virtue of the power and authority to us given for that purpose, do by these presents, in the name and in behalf of our respective constituents, fully and entirely ratify and confirm each and every of the said articles of confederation and perpetual union, and all and singular the matters and things therein contained : And we do further solemnly plight and engage the faith of our respective constituents, that they shall abide by the determinations of the united states in congress assembled, on all questions, which by the said confederation are submitted to them. And that the articles thereof shall be inviolably observed by the states we respectively represent, and that the union shall be perpetual. In witness whereof we have hereunto set our hands in Congress. Done at Philadelphia

in the state of Pennsylvania the 9th Day of July in the Year of our Lord, 1778, and in the 3d year of the Independence of America.

Josiah Bartlett,	John Wentworth, jun. August 8th, 1778,	}	On the part and behalf of the state of New Hampshire.
John Hancock, Samuel Adams, Elbridge Gerry,	Francis Dana, James Lovell, Samuel Holten,		On the part and behalf of the state of Mas- sachusetts Bay.
William Ellery, Henry Marchant,	John Collins,	}	On the part and behalf of the State of Rhode- Island and Providence Plantations.
Roger Sherman, Samuel Huntington, Oliver Wolcott,	Titus Hosmer, Andrew Adam,		On the part and behalf of the state of Con- necticut.
Jas. Duane, Fras Lewis,	William Duer, Gouv ^r Morris,	}	On the part and behalf of the state of New. York.
Jn ^o Witherspoon,	Nath ^l Scudder,		On the part and behalf of the state of New-Jer- sey, Nov. 26th, 1778.
Rob ^t Morris, Daniel Roberdeau, Jon ^a Bayard Smith,	William Clingan, Joseph Reed, 22d July, 1778,	}	On the part and behalf of the state of Penn- sylvania.
Tho. M ^c Kean, Feb. 12, 1779, John Dickinson, May 5, 1779,	Nicholas Van Dyke,		On the part and behalf of the state of Dela- ware.
John Hanson, March 1st, 1781,	Daniel Carroll, March 1st, 1781,	}	On the part and behalf of the state of Mary- land.
Richard Henry Lee, John Banister, Thomas Adams,	Jn ^o Harvie, Francis Lightfoot Lee,		On the part and behalf of the state of Vir- ginia.
John Penn, July 21st, 1778,	Corns Harnett, Jn ^o Williams,	}	On the part and behalf of the state of North. Carolina.
Henry Laurens, William Henry Drayton, Jn ^o Matthews,	Rich ^d Hutson, Thos. Heyward, jun.		On the part and behalf of the state of South- Carolina.
Jn ^o Walton, 24th July, 1778,	Ed ^{wd} Telfair, Ed ^{wd} Langworthy,	}	On the part and behalf of the state of Georgia

CONSTITUTION

OF THE

UNITED STATES OF AMERICA.

WE the People of the United States, in order to form a more perfect Union, establish Justice, insure domestic Tranquillity, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this CONSTITUTION for the United States of America,

ARTICLE. I.

SECTION. 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

SECTION. 2. 'The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

²No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

³Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

⁴When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

⁵The House of Representatives shall chuse their

Speaker and other Officers ; and shall have the sole Power of Impeachment.

SECTION. 3. ¹The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years ; and each Senator shall have one vote.

²Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third class at the Expiration of the sixth Year, so that one-third may be chosen every second Year ; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

³No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

⁴The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

⁵The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice

President, or when he shall exercise the Office of President of the United States.

‘The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

‘Judgment in Cases of Impeachment shall not extend further than to removal from Office, and Disqualification to hold and enjoy any Office of honour, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

SECTION. 4. ‘The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the places of chusing Senators.

‘The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

SECTION. 5. ‘Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum

to Business ; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

² Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

³ Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy ; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

⁴ Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

SECTION. 6. ¹ The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same ; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

“No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time ; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

SECTION. 7. ¹ All Bills for raising Revenue shall originate in the House of Representatives ; but the Senate may propose or concur with Amendments as on other Bills.

² Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States ; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If

any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

³ Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

SECTION. 8. The Congress shall have Power

¹ To lay and collect Taxes, Duties, Imposts and Excises; to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

² To borrow Money on the credit of the United States;

³ To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

⁴ To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

⁶ To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures ;

⁶ To provide for the Punishment of counterfeiting the Securities and current Coin of the United States ;

⁷ To establish Post Offices and post Roads ;

⁸ To promote the progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries ;

⁹ To constitute Tribunals inferior to the supreme Court ;

¹⁰ To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations ;

¹¹ To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water ;

¹² To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years ;

¹³ To provide and maintain a Navy ;

¹⁴ To make Rules for the Government and Regulation of the land and naval Forces ;

¹⁵ To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions ;

¹⁶ To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may

be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the Discipline prescribed by Congress ;

¹⁷ To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, Dock-Yards, and other needful Buildings ;—And

¹⁸ To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

SECTION. 9. ¹ The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or Duty may be imposed on such Importation, not exceeding ten dollars for each Person.

² The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

³ No Bill of Attainder or ex post facto Law shall be passed.

⁴ No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

⁵ No Tax or Duty shall be laid on Articles exported from any State.

⁶ No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.

⁷ No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

⁸ No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

SECTION. 10. ¹ No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post

facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

²No State shall, without the consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws : and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States ; and all such Laws shall be subject to the Revision and Controul of the Congress.

³No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of Delay.

ARTICLE. II.

SECTION. 1. ¹The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows

²Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress : but no Senator or Representative,

or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each ; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed ; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President ; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote ; A Quorum for this Purpose shall consist of a Member or Members from twothirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes

of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.

³ The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes ; which Day shall be the same throughout the United States.

⁴ No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President ; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

⁵ In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation, or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

⁶ The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive

within that Period any other Emolument from the United States, or any of them.

' Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation :—

“I do solemnly swear (or affirm) that I will faithfully
“execute the Office of President of the United States,
“and will to the best of my Ability, preserve, pro-
“tect and defend the Constitution of the United States.”

SECTION. 2. ' The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States ; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

' He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur ; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law : but the Congress may by Law vest the Appointment of such infe-

rior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

'The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

SECTION. 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient ; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper ; he shall receive Ambassadors and other public Ministers ; he shall take Care that the Laws be faithfully executed, and shall Commission all the officers of the United States.

SECTION. 4. The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

ARTICLE III.

SECTION. 1. The judicial Power of the United States, shall be vested in one supreme Court, and in

such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

SECTION. 2. ¹The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority ;—to all Cases affecting Ambassadors, other public Ministers, and Consuls ;—to all Cases of admiralty and maritime Jurisdiction ;—to Controversies to which the United States shall be a Party ;—to Controversies between two or more States ;—between a State and Citizens of another State ;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

²In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

³ The Trial of all Crimes, except in Cases of Impeach-

ment, shall be by Jury ; and such Trial shall be held in the State where the said Crimes shall have been committed ; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

SECTION. 3. ¹Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

²The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

ARTICLE. IV.

SECTION. 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

SECTION. 2. ¹The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

²A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice,

and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

³ No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

SECTION. 3. ¹ New States may be admitted by the Congress into this Union ; but no new State shall be formed or erected within the Jurisdiction of any other State ; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

² The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States ; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

SECTION. 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion, and on Application of the Legislature, or of

the Executive (when the Legislature cannot be convened) against domestic Violence.

ARTICLE. V.

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two-thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress ; Provided that no Amendment which may be made prior to the Year one thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article ; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

ARTICLE. VI.

¹ All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

² This Constitution, and the Laws of the United States which shall be made in Pursuance thereof ; and all Treaties made, or which shall be made, under the

authority of the United States, shall be the supreme Law of the Land ; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

*The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution ; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

ARTICLE. VII.

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.

DONE in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty seven and of the Independance of the United States of America the Twelfth. IN WITNESS whereof We have hereunto subscribed our Names,

GEO WASHINGTON—

Presidt and deputy from Virginia

NEW HAMPSHIRE.

JOHN LANGDON,

NICHOLAS GILMAN.

MASSACHUSETTS.

NATHANIEL GORHAM,

RUFUS KING.

CONNECTICUT.

WM. SAM'L. JOHNSON, ROGER SHERMAN.

NEW YORK.

ALEXANDER HAMILTON.

NEW JERSEY.

WIL: LIVINGSTON, DAVID BREARLEY,
WM. PATERSON, JONA. DAYTON.

PENNSYLVANIA.

B. FRANKLIN, THOMAS MIFFLIN,
ROBT. MORRIS, GEO: CLYMER,
THO: FITZSIMONS, JARED INGERSOLL,
JAMES WILSON, GOUV: MORRIS.

DELAWARE.

GEO: READ, GUNNING BEDFORD, Jun'r,
JOHN DICKINSON, RICHARD BASSETT,
JACO: BROOM.

MARYLAND.

JAMES M'HENRY DAN: OF ST. THOS. JENIFER,
DANL. CARROLL.

VIRGINIA.

JOHN BLAIR, JAMES MADISON, Jr.,

NORTH CAROLINA.

WM. BLOUNT RICH'D DOBBS SPAIGHT,
HU. WILLIAMSON.

SOUTH CAROLINA.

J. RUTLEDGE, CHARLES COTESWORTH PINCKNEY,
CHARLES PINCKNEY, PIERCE BUTLER.

GEORGIA.

WILLIAM FEW,

ABR. BALDWIN.

Attest :

WILLIAM JACKSON, *Secretary.*

ARTICLES

IN ADDITION TO, AND AMENDMENT OF

THE CONSTITUTION

OF THE

UNITED STATES OF AMERICA,

Proposed by Congress, and ratified by the Legislatures of the several States, pursuant to the fifth article of the original Constitution.

(ARTICLE 1.)

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

(ARTICLE 2.)

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

(ARTICLE III.)

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

(ARTICLE IV.)

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

(ARTICLE V.)

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger ; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb ; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law ; nor shall private property be taken for public use, without just compensation.

(ARTICLE VI.)

In all criminal prosecutions, the accused shall enjoy

the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have Compulsory process for obtaining Witnesses in his favour, and to have the Assistance of Counsel for his defence.

(ARTICLE VII.)

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

(ARTICLE VIII.)

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

(ARTICLE IX.)

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

(ARTICLE X.)

The powers not delegated to the United States by the

Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

ARTICLE XI.

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

ARTICLE XII.

¹ The Electors shall meet in their respective states, and vote by ballot for President and Vice President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—The President of the Senate shall, in presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not ex-

ceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President. ² The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. ³ But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

NOTE.—1. The Editor has availed himself of the foregoing copies of the original Constitution and Amendments found in the valuable work of Mr. W. Hickey, who obtained the certificate of the Secretary of State that they were “correct, in *text*, *letter*, and *punctuation*,” except as to “the small figures designating the clauses,” called by printers “superior figures,” which were “added merely for convenience of reference.” The certificate is by JAMES BUCHANAN, Secretary of State, and dated July 20th, 1846.

AMENDMENT OF 1ST FEBRUARY, 1865.

ARTICLE XIII.

1. Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

2. Congress shall have power to enforce this article by appropriate legislation.

ARTICLE XIV.

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the executive and judicial

officers of a State, or the members of the legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION. 3. No person shall be a senator or representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may, by a vote of two-thirds of each house, remove such disability.

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the

United States, or any claim for the loss or emancipation of any slave ; but all such debts, obligations, and claims shall be held illegal and void.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

ARTICLE XV.

SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State, on account of race, color, or previous condition of servitude.

SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.

DIRECTIONS FOR READING THE ANNOTATED CONSTITUTION.

1. Every noun will be found in the index, with reference to article, section, clause, and pages where found.

2. The text is in "long primer," or the larger type, and the notes in "brevier," or the smaller type.

3. The notes are numbered consecutively, and they stand between the texts in the order of the words and phrases defined and expounded.

4. The marginal numbers refer to other notes having relation to the same subjects-matter.

5. The abbreviations of authorities will be found after the "Table of Contents."

6. The citations in (parenthesis) show that they have been quoted in the case, or by the author to whom they are credited.

7. The definitions are all upon the highest authorities, and are usually the first remark in the note.

8. The interrogations (?) in the margin are for the use of teachers.

9. The figures in [17.] are not in the Constitution as filed in the State Department, but are inserted for convenience, because the general mode of printing the Constitution is with these enumerations.

THE CONSTITUTION

OF THE

UNITED STATES OF AMERICA.

What is the Constitution and its history? **2.** Let it be remembered: 1. That it is a government; 2. That it is the supreme law of the land. Farrar's Const. § 1-4. And the laws of the Union can be enforced by its own authority, on all persons and subjects-matter, over which jurisdiction was granted to any department or officer of the Government of the United States. *Rhode Island v. Massachusetts*, 12 Pet. 657, 729. It is not a league, but a government. *Gibbons v. Ogden*, 9 Wheat. 187. For a history of the thirteen colonies, until the formation of the Constitution of the United States, see Story's Commentaries on the Constitution, vol. 1; *Johnson v. McIntosh*, 8 Wh. 543-573; Curtis's Hist. of the Const. chap. 1, Book 1, §. 1-197; 1 Kent's Com. 11th Ed., sec. 10 and notes. See *Stearns v. United States*, 2 Paine, 300.

4

Went into operation when? **3.** This Constitution went into operation on the first Wednesday (4th day) of March, 1789. *Owings v. Speed*, 5 Wheat. 420; 1 Kent's Com. 219.

Did it create a new government? **4.** The new government was not a mere change in dynasty, as in a form of government, leaving the nation or sovereignty the same, and clothed with all the rights, and bound by all the obligations of the preceding one; but it was a new political body, a new nation, then, for the first time, taking its place in the family of nations. *Scott v. Sandford*, 19 How. 397.

Mutations? According to Mr. Duane, the Constitution of the United States has passed through three forms: 1. The revolutionary; 2. The confederate; 3. The constitutional; and the first and the third proceeded equally from the people in their original capacity. 1 Kent's Com., 11th Ed., 212, note *a*.

Was it a mere compact? The Constitution is not a mere compact among the States; but it is a government agreed to by the people of the United States. 1 Story's Const., 3d edition, § 344-365. and notes; 3 Elliot's De-

bates, 286, 287, 288, and notes; Webster's Speeches, 410; Farrar's Const. § 5-38. And whether it be formed by compact between the States, or in any other manner, its character is the same. President Jackson's Proclamation, 10th Dec. 1833; Story's Const., 3d Ed., p. 727. When adopted it was of complete obligation, and bound the State sovereignties. *McCulloch v. Maryland*, 4 Wh. 404; *Chisholm v. Georgia*, 2 Dall. 471; *Cohens v. Virginia*, 6 Wh. 414; *Metropolitan Bank v. Van Dyck*, 27 N. Y. Rep. 409. For a clear exposition of the government, see *Scott v. Sandford*, 19 How. 396; *Ableman v. Booth*, 21 How. 506.

WE, THE PEOPLE OF THE UNITED STATES, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

5. The preamble in the Constitution is constantly referred to by statesmen and jurists, to aid them in the exposition of its provisions. *Chisholm v. Georgia*, 2 Dall. 475; *Brown v. Maryland*, 12 Wh. 455-6; 1 Story's Const. chap. 4, § 5, *et seq.* It is the essence and epitome of the whole instrument by which the government is ordained and created, and its purposes, authority, and duty established. Farrar's Const. § 5.

It was one of the last clauses incorporated in the Constitution. Farrar, § 6. It was adopted after various other forms had been proposed and rejected. Farrar, § 6-12; 2 Curtis's Hist. of the Constitution, chap. xii. 372-376.

(1.) To form a more perfect union; (2.) to establish justice; (3.) to insure domestic tranquillity; (4.) to provide for the common defense; (5.) to promote the general welfare; (6.) to secure the blessings of liberty to themselves and posterity. (*Chisholm v. Georgia*, 2 Dallas, 419; 2 Cond. 635, 671.) Story's Const. § 463; Farrar, § 15-17.

The differences of opinion of the Southern States Rights or Calhoun school, as they have been called, may be seen in the preamble to the Constitution formed at Montgomery, Alabama, in March, 1861.

"We, the people of the Confederate States, each State acting in its sovereign and independent character, in order to form a federal government, establish justice, insure domestic tranquillity, and secure the blessings of liberty to ourselves and our posterity—looking to the favor and guidance of Almighty God—do ordain and establish this Constitution for the Confederate States of America." It will thus be seen that a "Federal Government" was substituted for a "more perfect union," which may be no great difference, as "government" carries the idea of perpetuity; for although "each

269. State acted in its sovereign capacity," the instrument was submitted to conventions of the people for ratification. This was the South Carolina form, offered by Mr. Rutledge in the Federal Convention. Farrar, § 8. It was at first so adopted, but afterwards changed. 2 Curtis, 373. The fourth and fifth objects, "general welfare and common defense," were also omitted, although the latter was retained in the first clause of section viii. of art. i., and all the war-powers were retained. Paschal's Annotated Digest, pp. 86, 88, notes 216, 217.

79, 80.

The parenthetical—"looking to the favor of Almighty God"—however piously uttered, met no response from the true Preserver of liberty. The actions of the Secessionists, more than any declaration in their Constitution, showed their belief in the right of each State to retire from the Union.

By whom
ordained
and estab-
lished?

291.

6. "WE THE PEOPLE." The Constitution was ordained and established, not by the States in their sovereign capacities, but, emphatically, by the *people* of the United States. *Martin v. Hunter's Lessee*, 1 Wh. 324; *Banks v. Greenleaf*, 6 Call, 277. It required not the affirmance of, nor could it be negated by, the State governments. *McCulloch v. Maryland*, 4 Wheat. 316, 404, 405. *Cohens v. Virginia*, 6 Wheat. 264, 413, 414; 1 Kent's Com., Lect. 10, p. 217; Farrar's Const. § 1-60; *Rhode Island v. Massachusetts*, 12 Wheat. 657, 720. The true doctrine would seem to be, that the Constitution was adopted by the people of the several States, which had been previously confederated under the name of the United States, acting through the delegates by whom they were respectively represented in the convention which formed the Constitution. Baldwin's Constitutional Views, 29-42. And see *Worcester v. Georgia*, 6 Pet. 569, where it is said by Mr. Justice McLean to have been formed "by a combined power exercised by the people through their delegates, limited in their sanctions to the respective States." And see Farrar, § 1-60. See *Barron v. Mayor of Baltimore*, 7 Pet. 243.

Was it by
majorities?

The Constitution resulted neither from the decision of a majority of the people of the Union, nor from that of a majority of the States. 1 Story's Const., § 360; *Ware v. Hylton*, 3 Dallas, 199; *Chisholm v. Georgia*, 3 Dall. 419; 2 Cond. 668, 671; 2 Elliot's Debates, 47; The Federalist, Nos. 22, 33, 39.

What means
"we the peo-
ple"?

16, 17, 24, 46,
169, 220.

The words, "WE THE PEOPLE OF THE UNITED STATES" and "CITIZENS" are synonymous terms, and mean the same thing. *Scott v. Sanford*, 19 How. 404. They are "the people of the several States;" "citizens of the United States;" "citizens of each State;" "numbers," "free persons," and "other persons." Farrar, § 30-38.

The language is, "WE THE PEOPLE," instead of "We the States." Patrick Henry, 2 Elliot's Debates, 47; and see 1 Elliot's Debates, 91, 92, 110; 1 Story's Const. § 348, note 1 of 3d ed.

And for a full exposition of the action of the people, see Story's Const., § 362-365, note 4 of 3d edition; 1 Webster's Speeches, 1830, p. 431; 4 Elliot's Debates, 326; Madison's Letter in the North American Review, October, 1830, p. 537, 538. For the

forms of ratification by the State Conventions, see Hickey's Const., chap. 2, pp. 129-192.

Negroes, whether slaves or free, were not included in the terms "people," or "citizens of the United States." Scott v. Sandford, 19 How. 404-5. The case of *Legrand v. Darnell*, 2 Pet. 664, does not conflict with this view. Id. 423-4. But the States may confer all the rights of citizenship upon an alien, or any other person, so far as that State is concerned; this, however, does not make him a citizen of the United States. Id. 405-406.

Were the
Negroes
people?

220

93

But a man is not incapacitated to be a citizen of the United States by the sole fact that he is colored or of African descent, and not a white man. Opinion of Attorney-General Bates, of 29th Nov., 1862, in which the whole subject of citizenship is discussed.

Can the
States confer
citizenship?

220

There is no authoritative definition of the phrase "citizen of the United States." Id.

But the question was put to rest by the Civil Rights Bill, in the following words:—

Declared
citizens by
the Civil
Rights Bill?

"Be it enacted, &c., That all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States." 14 St. p. 27, § 1; Paschal's Annotated Digest, Art. 5382.

275

There can be no doubt of the power of Congress to pass this act. *Smith v. Moody*, 26 Ind. 307.

7. "IN ORDER TO FORM A MORE PERFECT UNION." That it should not, like the Confederation, be a mere treaty, operating by requisitions on the States; and that the people, for whose benefit it was framed, ought to have the sole and exclusive right to ratify, amend, and control its provisions. (2 Elliot's Debates, (Virginia) 47, 61, 131, 57, 97, 98; 3 Id. (North Carolina,) 134, 145; 1 Id. (Massachusetts,) 72, 110.) 1 Story's Const. § 464, 469-480, and notes to third edition; Federalist, Nos. 13, 14, 51.

How a more
perfect
Union?

292.

The Government which preceded were "Articles of Confederation and Perpetual Union between the States." Ante, p. 9; Story's Const. § 229; Public Journals of Cong., by Way and Gideon, vol. i.; 1 Bioren and Duane, Laws of U. S. 6; Hickey's Const. 483.

How was
the Union
to be more
perfect?

It was intended to make the Union stronger, by giving it a well-balanced representative Legislature, an Executive, and a Judiciary, with guaranties for the enforcement of law; these provisions carried along the idea of a "more perfect" and "perpetual union." See 2 Curtis's History of the Constitution.

14, 165, 195.

8. TO ESTABLISH JUSTICE.—Justice is the constant and ardent desire to render to every one that which is his own. Justinian; Burrill's Law Dic., JUSTICE. It was probably used here in reference to the judicial power, as there was neither executive nor judiciary under the Articles of Confederation.—Ed. Justice is law. 9 Op. 481 (Black). The objects to be attained may be found in the jurisdiction given in the judicial power, and in the extradition obligations, as well as in the general powers of legis-

What is
justice?

293.

7

How
attained?

196, 198, 210, lation on specified subjects, and the inhibitions upon the States.
224, 225. Story's Const. § 482-489; 2 Kent's Com. 333-4.

How insure domestic tranquillity? **9. TO INSURE DOMESTIC TRANQUILLITY.**—This, doubtless, means peace among and between the States. And it was sought to be attained by the equality of representation, actual and proportionate; the power to regulate commerce among the States; the inhibitions upon them; the jurisdiction of the Supreme Court over controversies between them; the guaranties of the rights of the citizens in each; the rendition of criminals and persons held to service; the guaranties of republican forms of government, and against domestic strife; and the national power of legislating over all irritating subjects. See Story's Const. § 490-494; the Federalist, Nos. 9, 10, 41.

What is the common defense? **10. TO PROVIDE FOR THE COMMON DEFENSE.**—This means the defense of the nation against all enemies, foreign and domestic. The end was intended to be attained by giving the power to Congress to declare war; to provide for armies and navies; grant letters of marque and reprisal; forts and arsenals; for arming and disciplining the militia; making treaties the supreme law; making the President the commander-in-chief of the army and navy, and of the militia when in actual service. Federalist, Nos. 24, 25, 41; 117, 123, 130, 175, 238, 240. Ex parte Coupland, 26 Tex. 386; Paschal's Annotated Digest, notes 218, p. 88-90; Story's Const. §§ 494, 495; Farrar, § 95.

What is the general welfare? **11. TO PROMOTE THE GENERAL WELFARE.**—This, doubtless, means the general and equal advantages to all the people and the States, arising from the grants of power contained in the Constitution, as well as the inhibitions upon Congress and the States, and the guaranties in the Constitution.

Without claiming this as a warrant for the exercise of doubtful implied powers, we may point to the regulation of commerce; the coining of money; post-offices and post-roads; the acquisition and extent of territory; the patents and copy-rights, and the general protection of the citizen everywhere, as vast blessings, the true value of which no one can comprehend.—ED. See Story's Const. 497-506.

The words "common defense and general welfare" were not inserted until 4th Sept., 1787. "Safety" seems to be the first object. (Jay, Federalist, Nos. 3, 4), Farrar, § 101. The same words occur in the first clause of section 7. See criticisms upon them. Id.

12. TO SECURE THE BLESSINGS OF LIBERTY TO OURSELVES AND OUR POSTERITY.

What is liberty? Civil liberty means the natural liberty of every one to pursue his own happiness, except so far as he is restrained by the laws of the land. Burrill's Law Dictionary, CIVIL LIBERTY; Co. Litt. 116, b, 1 Bl. Com. 125; note 5; 2 Kent's Com. 26.

How attained? This was doubtless the liberty intended to be secured and transmitted to posterity in perpetuity. The object has been sought to be more permanently secured by the amendments incorporating

the great principles of *Magna Charta*; the reservation of powers Bill of to the States; the destruction of negro slavery, which became rights. dangerous to liberty, and the guaranties to the citizen in all the 246. Amendments. Story's Const. § 17, 507-517; 1 Elliot's Debates, 245-275. 278, 296, 297, 332; 2 Id., 47, 96, 136; 3 Id., 243, 257, 294. The Federalist, everywhere. See Farrar, §§ 34, 104-122.

13. "OF THE UNITED STATES OF AMERICA."—Mr. Calhoun, in his essay on Government and in his speeches, contended, that this meant "States united"—that is, a league or compact—and not a government. But the true definition, doubtless is, the union of States under all the restrictions contained in the Constitution. "The Government of the United States." *Cohens v. Virginia*, 6 Wheat. 2, 4, 6. 264. The United States is a government, and consequently a body politic and corporate, capable of attaining the objects for which it was created, by the means which are necessary for their attainment. *United States v. Maurice*, 2 Brock. 109. And, to the extent of its limited powers, it is supreme. See the *Dred Scott* decision, and *Abelman v. Booth*. Through the instrumentality of the proper department to which the delegated powers are confided, it may enter into contracts not prohibited by law, and appropriate to the just exercise of those powers. *United States v. Tingey*, 5 Pet. 128. As a corporation, it has capacity to sue by its corporate title. *Dixon v. United States*, 1 Brock. 177; *Dugan v. United States*, 3 Wh. 181. It may compromise a suit, and receive real and other property in discharge of the debt, in trust, and sell the same. *United States v. Lane's Administrators*, 3 McLean, 365; *Neilson v. Lagow*, 12 How. 107-8. The above decisions quoted and approved. *Dikes v. Miller*, 25 Tex., Supp. 289, and held that, upon the same principle, the owner of land may file a release in the general land-office, and divest himself of the right to recover. *Id.*; *Paschal's Annotated Digest*, note 4. Absolute sovereignty, and complete supremacy in the exercise of all governmental powers confided to the National Government, were intended to be secured; and it is believed that such intention was accomplished. *Metropolitan Bank v. Van Dyck*, 27 N. Y. Rep. 407. The powers of the General Government and of the States, although both exist, and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other within their respective spheres. And the sphere of action appropriated to the United States is as far beyond judicial process issued by a State Judge or a State Court, as if the line of division were traced by landmarks and monuments visible to the naked eye. (*Ableman v. Booth*, 21 How. 506, 516); *Metropolitan Bank v. Dan Dyck*, 27 N. Y. R. 411. See also Story's Const. § 413; *The People v. New York Central Railroad Company*, 24 N. Y. 485, 486; *Newell v. the People*, 3 Seld. 93; *Gibbons v. Ogden*, 9 Wheat. 188; *Martin v. Hunter*, 1 Wheat. 304, 326, 327; *McCulloch v. Maryland*, 4 Wheat. 416, for the rules of interpretation as to the powers hereinafter granted.

What is meant by the United States of America?

Is it a corporation?

2, 4.

Can it compromise suits?

What was intended?

Distinguish the powers?

71.

188.

389.
395.

ARTICLE I.

SEC. I.—All legislative powers herein granted, shall be vested in a Congress of the United States, which shall consist of a senate and house of representatives.

14. LEGISLATIVE POWER is the law-making power or supreme power, wherein, according to Blackstone, resides the sovereignty, or at least the exercise of sovereignty, of the State. 1 Bl. Com. 49.

15. CONGRESS.—An assembly of persons; an assembly of envoys, commissioners, or deputies. An assembly of representatives from different governments to concert measures for their common good, or to adjust their mutual concerns. Webster. Here it is the National Legislature. 1 Kent's Com. 221; Burrill's Law Dic., CONGRESS.

The word was doubtless transferred from the Articles of Confederation, where each State expressly retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right which is not by this Confederation expressly delegated to the United States in Congress assembled. The government was only "a firm league of friendship." Art. 2, *ante*, p. 9.

The wisdom of this division of legislative power into two branches has been vindicated by our wisest statesmen. Story's Const. chap. viii. § 545-570; 1 Kent's Com. 208-210; The Federalist, No. 22; De Lolme on the Constitution of England, B. 2, chap. iii.; Randolph's Letter, 3 Amer. Museum, 62, 66; Adams's Defense of American Constitutions, 105, 106, 121, 284, 286; 2 Pitk. Hist. 294, 305, 316; Paley's Moral Philosophy, b. 6, ch. vii.; Wilson's Law Lect. 393-405.

In regular logical consecutive order the Senate should be first defined, but it is not. [Ed.]

SEC. II.—[1.] The house of representatives shall be composed of members chosen every second year by the people of the several States; and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature.

16. The House simply means the popular branch. By THE PEOPLE is meant the wise principle of direct representation and responsibility. (The Federalist, Nos. 40-52; 1 Wilson's Law Lect. 429-433; 2 Id. 124-128; 1 Tucker's Blacks. Com., App. 28; Paley's Moral Philosophy, b. 6, ch. 6); Story's Const. § 571-576; Curtis's Hist. of the Const. 148.

"THE PEOPLE" are that portion of the citizens of the United

States who are the resident inhabitants of particular States. Aliens are excluded. Farrar, § 24-38. This accords with Mr. Calhoun's speech upon the admission of Michigan. But it is not sustained by practice, and was denied in the speeches by Mr. Stephens and others on the admission of Minnesota. Properly, "THE PEOPLE" here really mean the qualified voters. But here Mr. Farrar contends that Congress may prescribe the qualifications. Farrar, § 124-141. Mr. Farrar admits the practice to be contrary to his theory, but insists that an alien is not an inhabitant. (College v. Gove, 5 Pick. 373); Farrar, § 133. It will be observed that the elections are by "the people of the several States." But what people shall vote? They are the "electors of the most numerous branch of the State legislature." There was then very little uniformity as to these voters. 2. Elliot's Debates, 38; 2 Wilson's Law Lecture, 128-131; Federalist, No. 52 to 54; Story's Const. chap. 9, § 570, *et seq.* 2 Curtis's Hist. of the Const. 198. Time has only lessened the uniformity, for many of the States allow unnaturalized aliens to vote. See the constitutions of Illinois, Indiana, and Michigan, and the congressional debate upon suffrage, 1865-66. In the Dred Scott case the subject was fully discussed, and it was said that, while congress possessed the exclusive power of naturalization, a negro could not be made a citizen of the United States; that a State could confer the right of suffrage on an alien, or any one else, but it could not thereby make them citizens of the United States. Scott v. Sandford, 19 How. 404-414.

Who are electors?

Is a negro one of the people?

220.

May he be a voter?

The Constitution of the Confederate States, which showed the Southern mind as to proper amendments, interpolated the words "shall be citizens of the Confederate States." And to the section was added a clause, "but no person of foreign birth, not a citizen of the Confederate States, shall be allowed to vote for any officer, civil or political, State or federal." Paschal's Annotated Digest, p. 86.

What of the Confederate Constitution?

This proved the willingness to make suffrage a matter of national legislation, and the determination to avoid participation in the elections by persons who were not national citizens.

Mr. Farrar has only followed these extreme views. The question of limited suffrage, and the motives which influenced the Convention to leave the power with the States, will be found in the following authorities: 1 Blacks. Com. 171, 172, 463, 464; Montesquieu's Spirit of Laws, b. 11, chap. vi.; Paley's Moral Philosophy, b. 11, chap. vi.; Locke on Government, p. 2, §§ 149, 227; Adams's Amer. Const., letter vi. pp. 263, 440; Jefferson's Notes on Virginia, 191; Story's. Const. 576-587; Curtis's Hist. of the Const. 187, 194, 200.

What is the reason of the rule?

QUALIFICATIONS.—The word as here used is hardly within any of the ordinary significations. Webster's Dic., QUALIFICATION.

What means qualifications?

- There was this logic and consistency in the rule adopted:
1. Those who indirectly elect the senators and the president and vice-president, directly elect the representatives in Congress.
 2. The National Constitution could not well fix a rule as to voters for Congress without also extending it to all elections.
 3. Any

19, 35, 46 167.

- 28, 233. absolute abuse of the rights of electors, such as transferring the choice to other magistrates, or to a particular profession, would be subject to the guaranty of a republican form of government.

What are the qualifications as now defined by the States? **17.** The following are the "QUALIFICATIONS" for electors in the different States at the present time: In all the States, males twenty-one years of age.

Alabama? **ALABAMA.**—White citizens of the United States; residence in the State one year, and in the county three months. Soldiers, seamen, and marines of the United States, and persons infamous for crime excluded. Const. of 30th Sept., 1865. Hough, New York Convention Manual, 82. See new Constitution of 1867.

299.

Arkansas? **ARKANSAS.**—White citizens of the United States; six months residence; soldiers, seamen, and marines in time of peace excluded. Constitution of 1864-'5. Id. 85.

California? **CALIFORNIA.**—White citizens of the United States and of Mexico, who shall have elected to become citizens of the United States under the treaty of the 30th May, 1848. Indians may be qualified by two-thirds of the legislature.—Constitution of 13th October, 1849. Id. 96, 97.

Connecticut? **CONNECTICUT.**—Every white male citizen of the United States; one year's residence; freehold of the yearly value of six dollars; good moral character; able to read any article of the Constitution, or any section of the statutes of the State. Amendments of October, 1845, and October, 1855. Id. 115.

Delaware? **DELAWARE.**—Free white citizens of the United States; one year's residence; having paid a county tax within two years, which had been assessed at least six months before the election; no tax if between twenty-one and twenty-two years old; no person in the military, naval, or marine service of the United States shall be considered as acquiring a residence in this State by being stationed in any garrison, barrack, or military or naval place or station within this State; and no idiot or insane person, or pauper or person convicted of any crime deemed by law felony, shall enjoy the right of an elector. Constitution of 2d December, 1831. Id. 121.

Florida? **FLORIDA.**—Citizens of the United States, with one year's residence. Officers, soldiers, and marines of the army and navy do not thereby acquire residence. The legislature may exclude persons convicted of infamous crimes. Constitution of 7th November, 1865. Id. 135.

Georgia? **GEORGIA.**—Free white male citizens of this State and of the United States; have paid all taxes required of them, and which they have had an opportunity of paying, for one year preceding the election; two years' residence in the State and one year in the county. Constitution of 7th Nov., 1865. Id. 149.

Illinois? **ILLINOIS.**—White male citizens. Residence one year; *inhabitants* of one year's residence at the adoption of the Constitution. Constitution of 31st August, 1847. Id. 169.

INDIANA.—White male citizens of the United States; six months residence; if of foreign birth, one year's residence in the United States and six months in this State; and shall have declared his intention to become a citizen of the United States, conformably to the laws on the subject of naturalization. No soldier, seaman, or marine of the United States, or of their allies, shall be deemed to have acquired a residence in the State in consequence of having been within the same; nor shall any such soldier, seaman, or marine have the right to vote. No negro or mulatto shall have the right to vote. Const. of 10th Feb., 1865. Id. 171.

IOWA.—White male citizens of the United States; six months residence in the State and sixty days in the county. Persons in the military, naval, or marine service of the United States; idiots, insane, or convicted of infamous crimes excluded. Const. of the 5th March, 1857. Id. 184.

KANSAS.—Citizens of the United States; or persons of foreign birth who shall have declared their intentions to become citizens, conformably to the laws of the United States on the subject of naturalization; six months residence in the State, and thirty days in the township. No person under guardianship, *non compos mentis*, or insane, or any person convicted of treason or felony, unless restored to civil rights, nor any soldier, seaman, or marine shall be allowed to vote. Const. of 29th July, 1859. Id. 202.

KENTUCKY.—Free white male citizens; residence two years in the State, or one year in the county, town, or city in which he offers to vote, and sixty days in the precinct. Const. of 11th June, 1850. Id. 210.

LOUISIANA.—White male citizens of the United States; residence in the State twelve months, and three months in the parish. Const. of Sept., 1854. Id. 227.

MAINE.—Male citizens of the United States, excepting paupers, persons under guardianship, and Indians not taxed; established residence three months. Persons in the military, naval, or marine service of the United States or this State, and students not deemed to have acquired residence. Const. of 29th Oct., 1819. Id. 240.

MARYLAND.—White male citizens of the United States; residence one year in the State and six months in the county. Const. of 1867 (and so of 1864). Id. 250.

MASSACHUSETTS.—Male citizens (excepting persons or paupers under guardianship); residence in the State one year; in the town or district six months; having paid all required taxes. Const. of 1780, as amended. Id. 294. Amendment, Art. XX. No person shall have the right to vote, or be eligible to office, under this Commonwealth, who shall not be able to read the Constitution in the English language and write his name; *Provided, however*, that the provisions of this amendment shall not apply to any person prevented by physical disability from complying with its requisi-

tions, nor to any person who now has the right to vote, nor to any person who shall be sixty years of age or upward at the time this amendment takes effect. Id. 298. By amendment XXVI., of 1850, persons of foreign birth not allowed to vote until two years after naturalization. Id. 300.

Michigan?

MICHIGAN.—Every white male citizen; every white male inhabitant residing in the State on the 24th day of June, 1835; every white male inhabitant on the first day of January, 1850, who has declared his intention to become a citizen of the United States, pursuant to the laws thereof, six months preceding an election, or who has resided in this State two years and six months, and declared his intention as aforesaid; and every civilized male inhabitant of Indian descent, a native of the United States and not a member of any Indian tribe, shall be an elector and entitled to vote. Residence three months in the State. Const. of 1850. Id. 307. Persons absent in the actual military service of the United States not disqualified. Presence in such service is not residence. Id. 308.

Minnesota?

MINNESOTA.—1. White citizens of the United States; 2. White persons of foreign birth who shall have declared their intention to become citizens; 3. Persons mixed with white and Indian blood, who have adopted the customs and habits of civilization; 4. Persons of Indian blood residing in this State who have adopted the language, customs, and habits of civilization, after an examination before any district court of the State, &c., and pronounced capable of citizenship; residence one year in the United States and four months in the State before the election. Const. of 1857-8. Id. 325.

Mississippi?

MISSISSIPPI.—Free white male citizens of the United States; one year's residence in the State, four months in the county or town. Const. 1832 as amended in 1865. Id. 336.

Missouri?

MISSOURI.—White male citizens of the United States, and every white male person of foreign birth who may have declared his intention to become a citizen of the United States, according to law, not less than one year nor more than five years before he offers to vote; residence one year in the State and sixty days in the county, city, or town. The disqualification of all who participated in or sympathized with the rebellion is most searching and comprehensive. After 1876, new voters must be able to read and write or be disabled therefrom by physical disability. Const. of 1865. 348-351.

143.

Nebraska?

NEBRASKA.—1. White male citizens of the United States; 2. White persons of foreign birth who shall have declared their intention to become citizens, conformably to the laws of the United States on the subject of naturalization. Const. of 1867. Id. 371.

By the act of admission agreed to by the legislature, the right is not restricted to whites.

This State was admitted March, 1867, as the 37th State.

Nevada?

NEVADA.—Every white male citizen of the United States; residence six months in the State and thirty days in the county; persons convicted of treason or felony and not restored to civil rights,

or who, after arriving at the age of eighteen years, shall have voluntarily borne arms against the United States, or held civil or military office under the so-called Confederate States, unless an amnesty be granted to such person by the Federal Government, excluded; also idiots and insane persons. Const. of 1864. Id. 380, 381.

NEW HAMPSHIRE.—Every male inhabitant of each town, and New Hampshire parish with town privileges, and places unincorporated, excepting shire? paupers, and persons excused from paying taxes at their own request. Const. of 1792. Id. 403.

NEW JERSEY.—White male citizens of the United States; residence one year in the State and five months in the county; officers, soldiers, and marines of the United States do not acquire residence; paupers, idiots, and insane persons and persons infamous excluded. Const. of 1844. Id. 413.

NEW YORK.—Male citizens who shall have been such ten days; residence in the State one year, and in the county four months. Men of color, unless citizens of this State for three years, and for one year seized of a freehold of the value of two hundred and fifty dollars, on which they shall have paid a tax, excluded. Absence in military service does not exclude. Const. of 1846, as amended in 1863. Id. 49, 50.

NORTH CAROLINA.—Every free white man—being a native or North Carolina? naturalized citizen of the United States, and who has been an inhabitant of this State for twelve months immediately preceding the day of election, and shall have paid all taxes. Amendment of 11th December, 1856, ratified 10th September, 1857. Id. 431.

OHIO.—Free white male citizens of the United States; residence one year in the State. Soldiers, marines, idiots, and insane persons excluded. Mulattoes in a certain degree are excluded. Const. of 1851. Id. 438.

OREGON.—White male citizens of the United States, and white males of foreign birth who shall have declared their intention; residence one year as to foreigners and six months as to citizens. Sailors, soldiers, idiots, insane, Chinamen, and negroes excluded. Const. of 1857. Id. 449.

PENNSYLVANIA.—Freemen; residence one year; must have paid taxes within two years; white freemen, citizens of the United States, between twenty-one and twenty-two years of age, not obliged to have paid taxes; if absent in the military service of the United States, electors not to lose the right to vote. Const. of 1838, as amended in 1857 and 1864. Id. 472.

RHODE ISLAND.—Male citizens of the United States; residence one year; real estate in the State of the value of one hundred and thirty-four dollars, or which brings a clear rental of seven dollars per annum. Soldiers, marines, &c., do not thereby acquire a residence; paupers, lunatics, or persons *non compos mentis*, and Narraganset Indians, specially excluded. Const. of 1842. Id. 474, 475. Soldiers absent in actual military service allowed to vote. Id. 481.

South Carolina ? SOUTH CAROLINA.—Free white men ; residence two years in the State and six months in the district ; immigrants from Europe with like residence who have declared their intention to be naturalized ; paupers, soldiers, and marines specially excluded. Const. of 1865. Id. 486.

Tennessee ? TENNESSEE.—White men, citizens of the United States (certain blacks included under previous constitution) ; residence one year. Const. of 1839. Id. 495.

By the amendment of 1866, § 9, the qualifications of voters and the limitation of the elective franchise may be determined by the General Assembly which shall first assemble under the amended constitution. Id. 504. The General Assembly extended the right of suffrage to the blacks, and excluded certain classes of those engaged in the rebellion.

Texas ? TEXAS.—Every free male person, who shall be a citizen of the United States (Indians not taxed, Africans, and descendants of Africans excepted) ; residence one year in the State and six months in the county. Const. of 1866. Id. 507. The words, "or who is, at the time of the adoption of the Constitution by the Congress of the United States, a citizen of Texas," were in the Constitution of 1845, but were omitted from the revision. Paschal's Annotated Digest, 51, 932.

Vermont ? VERMONT.—Freemen of the State, who are natural born citizens of Vermont or some one of the United States, or naturalized. Const. of 1793 as amended. New York Convention Manual, by Hough, 523, 529.

Virginia ? VIRGINIA.—White male citizens of the Commonwealth ; residence one year in the State and six months in the county. Must have paid the previous year's assessment of taxes. Const. of 1864. Id. 533, 545.

West Virginia ? WEST VIRGINIA.—White male citizens of the State ; residence one year. Paupers, convicts of treason, felony, or bribery in election, persons who have given aid to the rebellion, unless he has volunteered into the military and naval service of the United States and been honorably discharged therefrom, excluded. Const. 1861-3, as amended 24th May, 1866. Id. 547, 548.

Wisconsin ? WISCONSIN.—1. Citizens of the United States. 2. Persons of foreign birth who shall have declared their intention to become citizens, conformably to the laws of the United States on the subject of naturalization. (The word "white" was stricken out by amendment.)

3. Persons of Indian blood who have once been declared by law of Congress to be citizens of the United States, any subsequent law of Congress to the contrary notwithstanding.

4. Civilized persons of Indian descent, not members of any tribe. Const. of 1848. Id. 561, 562.

Is there any uniformity ? It will thus be seen that the only uniformity is, that electors in all the States require the qualification of being *males over twenty-*

one years of age, and of residence longer or shorter. The general rule is, "*white citizens of the United States*;" but negroes or persons of African descent are electors in all New England except Connecticut; in Nebraska, Tennessee, Wisconsin, and by construction, perhaps, in other States; persons in the military and naval service are excluded in some States, and idiots, lunatics, and persons *non compos mentis* in others.

Age.
508.

In Oregon, Chinamen are excluded. In all the late fifteen slave States, except Tennessee, persons of African descent are excluded. In Indiana, Michigan, Wisconsin, Oregon, and South Carolina, unnaturalized persons of longer or shorter residence who have declared their intention are voters; while in Massachusetts the naturalized are excluded until two years after naturalization. In a few of the northwestern States Indians are allowed to vote. The qualification of freeholder or tax-payer is required in a few States; and the benefit of clergy or the power to read and write is required in two States. Disqualification for infamous offenses exists in a few States. So that in fact there is no uniformity except as to sex and age, and less than there was at the formation of the federal Constitution. The qualifications in no two States were exactly alike. Story's Const., § 637; The Federalist, No. 54. As to the free persons of African descent, while they were only half a million, the majority of whom resided in the slave States, "*de minimis non curat lex*," seems to have been the maxim. But now that they are one-eighth of the whole population, and constitute a majority of "citizens of the United States" in several States, whatever may have been our habits of thought, the statesman and the philosopher is obliged to face the question, and to consider the propriety of a uniform rule for electors.

What is the only uniformity?

24.

Why the necessity of a uniform rule?

220.

18. But citizenship of the United States, or of a State, does not of itself give the right to vote; nor, *e converso*, does the want of it prevent a State from conferring the right of suffrage. Scott v. Sandford, 19 How. 422.

Is citizenship suffrage?

The right of suffrage is the right to choose officers of the government; and it does not carry along the right of citizenship. Bates on Citizenship, 4, 5. Our laws make no provision for the loss or deprivation of citizenship. Id.

What is the right of suffrage?
30.

The word CITIZEN is not mentioned in this clause, and its idea is excluded in the QUALIFICATIONS for suffrage in all the State constitutions. Id. 5, 6. 10 Op. 388.

Does this section exclude the idea of citizen?

American citizenship does not necessarily depend upon nor coëxist with the legal capacity to hold office or the right of suffrage, either or both of them.

Does citizenship depend upon suffrage?

No person in the United States did ever exercise the right of suffrage in virtue of the naked, unassisted fact of citizenship. Id.

93.

There is a distinction between political *rights* and political *powers*. The former belong to all citizens alike, and cohere in the very name and nature of citizenship. The latter (voting and holding office) does not belong to all citizens alike, nor to any citizen merely in virtue of citizenship. His *power* always depends upon extraneous facts and superadded qualifications; which facts and

What is the distinction between political rights and powers?
19, 35, 63, 169,

170. qualifications are common to both citizens and aliens. Bates on Citizenship.

What are the qualifications of representatives.

[2.] No person shall be a representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen.

What persons?

46.

Representative?

19. "PERSON" is here undefined, but it is supposed to mean males. A representative is one chosen by the qualified voters, at the time prescribed by the States or Congress, in the manner prescribed by law, and having the qualifications of age, citizenship, and inhabitancy or domiciliation.

Citizen of the United States?

220

Who are citizens?

The Constitution having fixed the qualifications of members, no *additional* qualifications can rightfully be required by the States. *Barney v. McCreery*, Cl. & Hall, 176: *Story's Const.* § 624-629; *Federalist*, No. 52. But if a country be conquered, purchased, or annexed, and the inhabitants thus incorporated by such revolutions, as the purchase of Louisiana and Florida, the annexation of Texas, and the conquest and cession of California, the inhabitants become national citizens, and are eligible to office, not as naturalized people, according to uniform rule, but as denizens of the acquired soil, whether native born or naturalized. It was so held in the case of *Mr. Levy [Yulee]*, of Florida, upon a contest in the House of Representatives of the United States. *Mr. Clark of Louisiana*, and *Senator Porter*, of that State, as well as all the European inhabitants of Louisiana, Florida, Texas, California, New Mexico, Arizona, and Walrussia, and all born upon those Territories, owed their naturalization to the law of conquest, purchase, or annexation. Native inhabitants have been admitted as delegates from New Mexico, under the general description of citizenship.

The object was to exclude aliens. *Story's Const.* § 612-629. See *Farrar*, § 256-281.

6, 17, 24, 35, 44, 220.

Yet "PERSON" and "CITIZEN" in this sentence cannot have the same comprehensive meaning of "PEOPLE" or "ELECTORS" in the preamble, and in Art. 1, § 1, clause 1. From necessity it must have a limitation beyond what is defined in the clause.

Who is an inhabitant when elected?
22, 23, 44, 46.

20. AN INHABITANT OF A STATE is one who is *bonâ fide* "a member of the State, subject to all the requisitions of its laws, and entitled to all the privileges and advantages which they confer." *Bailey's Case*, Cl. & Hall, 411. A person residing in the District of Columbia, though in the employment of the general government, is not an inhabitant of a State, so as to be eligible to a seat in congress. *Id.* But a citizen of the United States, residing as a public minister at a foreign court, does not lose his character of inhabitant of that State of which he is a citizen, so as to be disqualified for election to congress. *Id.*: *Forsyth's Case*, *Id.* 497. See *Ramsay v. Smith*, Cl. & Hall, 123. *Key's Case*, Cl. & Hall, 224.

[3.] Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers; which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons. The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of representatives shall not exceed one for every thirty thousand, but each State shall have at least one representative; and, until such enumeration shall be made, the State of New Hampshire shall be entitled to choose three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

What is the apportionment of representatives and direct taxes?

Census?

Number of representatives?

21. REPRESENTATIVES.—As to the reasons for the rule, see Story's Const. § 630-689. Notes to third edition; 1 Elliott's Debates, 212, 213; 2 Pitk. Hist. 233-248.

Give facts of Representatives and numbers.

As the population has increased, the ratio, or "numbers" necessary to elect a representative, has been increased, so as not to make the body too large. They have stood through each decade as follows:—1790—43,000. 1 St. 253; 1800—33,000. 2 St. 128; 1810—35,000. Act of 21 Dec., 1811, ch. 9; 1820—40,000. 3 St. 651; 1830—47,700. 4 St. 516; 1840—70,000. 5 St. 491; 1850—93,420. Rep. population divided by 233, 9 St. 432, 433; 1860—126,823. 12 St. 353; 2 Brightly's Dig. 84. Obtained by dividing by 241, giving to Ohio, Kentucky, Illinois, Iowa, Minnesota, Vermont, and Rhode Island, each an additional member.

163.

44

22. DIRECT TAXES, perhaps, mean, in the stricter sense, a rate imposed by government upon individuals (polls), lands, houses, horses, cattle, possessions, and occupations, as distinguished from customs, duties, imposts, and excises. Webster. See Burrill's Law Dic., TAX.

What are direct taxes?

In the case of *Hylton v. The United States* the question was much discussed; but no authoritative conclusion seemed to be

72-77, 144.

163, 164. settled. The general impression seemed to be, that a tax on real estate, such as the war tax of 1862, might be intended.

See the subject discussed. Story's Const. § 955-957.

Only four direct taxes have been laid: In 1793, 1813, 1815, 1861. Story's Const. § 642; 2. Brightly's Dig. 407; Internal Revenue pamphlets everywhere. The Internal Revenue tax is supposed to come under a different classification.

On personal?

A tax on carriages is not a direct tax. There are three kinds of taxes: duties, imposts, and excises, which are to be laid by the rule of *uniformity*; and capitation and direct taxes on land, which are to be laid by the rule of *apportionment*. Hylton v. the United States, 3 Dallas, 171. License Tax Cases, 5 Wall. 477. The better opinion seemed to be, that the direct taxes were a capitation or poll tax, or a tax on land. Hylton v. United States, 3 Dall. 171; 1 Kent's Com. 255, 256. This does not preclude the right to

What by uniformity, and what by apportionment?

144.

impose a direct tax in the District of Columbia (and the Territories) in proportion to the census directed to be taken by the Constitution. Loughborough v. Blake, 5 Wh. 317; 1 Kent's Com. 256.

How apportioned?

23. APPORTIONED.—Proportion and ratio are equivalent words; and it is the definition of proportion *among numbers*, that they have a *ratio common to all—a common divisor*. (Jefferson in 1792.) Story's Const. 3d Ed. § 683, note 2; which note also contains Mr. Webster's report on fractional numbers, in 1832. These two opposite views exhaust the whole argument. See Farrar, § 131-141. In these he discusses "free persons," and "all other persons." The practice has been to exclude from the "numbers" none except two-fifths of the slaves, thus counting the three-fifths of the "all other persons." That is, five slaves were only equal to three "free persons," whether colored or aliens. See Story's Const. § 630-689, 3d Ed., and the voluminous notes, which exhaust the whole subject.

17, 18,
144, 220.

What are numbers?

24. NUMBERS.—The meaning of the word "numbers" is, that two-fifths of all the slaves were excluded; but the free negroes, and all other persons, except tribes of Indians, were enumerated. The total numbers by the eighth census (1860) were:—

144, 23.

506, 507

In the free States and Territories—whites.....	18,936,579
“ “ “ free colored.....	237,218
In the slave States—whites.....	8,039,000
“ “ slaves.....	3,950,000
“ “ free colored.....	251,000
Deduct two-fifths of slave population.....	1,580,000
Leaving a representative slave population of.....	2,370,000
Total free population in the States, District of Columbia, and Territories	27,463,797
Total slave population.....	3,961,129
Ratio of representatives.....	127,381

The apportionment of representation under the census of 1860 was as follows: Alabama 6, Arkansas 3, California 3, Connecticut 4, Delaware 1, Florida 1, Georgia 7, Illinois 14, Indiana 11, Iowa

6, Kentucky 9, Louisiana 5, Maine 5, Maryland 5, Massachusetts 10, Michigan 6, Minnesota 2, Mississippi 5, Missouri 9, New Hampshire 3, New Jersey 5, New York 31, North Carolina 7, Ohio 19, Oregon 1, Pennsylvania 24, Rhode Island 2, South Carolina 4, Tennessee 8, Texas 4, Vermont 3, Virginia 11, Wisconsin 6. The territories of Kansas, Nebraska, and Nevada have since been admitted as States, each with 1 representative; Colorado has been organized under an enabling act, and will be admitted with 1 representative; Virginia has been divided, and West Virginia has 3 representatives, leaving Virginia 8.

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NUMBERS OF THE STATES AND TERRITORIES, &c.—1860.

STATES.	CENSUS OF 1860.				RATIO OF INCREASE FROM 1850 TO 1860.			
	White.	Free colored.	Slave.	Total.	White.	Free colored.	Slave.	Total.
Alabama	526,431	2,690	435,080	964,201	23.43	18.76	27.18	24.96
Arkansas	324,191	144	111,115	435,450	99.88	81.25	135.91	107.46
California	361,353	4,066		379,994	294.34	324.74		310.37
Connecticut	451,520	8,627		460,147	24.35	12.14		42.10
Delaware	90,589	19,829		112,216	27.28	9.72	21.48	22.60
Florida	77,748	932	61,745	140,425	64.70		57.07	60.59
Georgia	591,588	3,500	462,198	1,057,286	13.42	19.41	21.10	16.67
Illinois	1,704,323	7,628		1,711,951	101.45	40.32		101.06
Indiana	1,339,000	11,428		1,350,428	37.03	1.47		36.63
Iowa	673,844	1,069		674,913	251.18	231.53		251.14
Kansas	106,579	625		107,206				
Kentucky	919,517	10,684	225,483	1,155,684	20.76	6.72	6.87	17.54
Louisiana	357,629	18,647	331,726	708,002	39.98	6.78	35.50	36.74
Maine	626,952	1,327		628,279	7.76	2.14		7.74
Maryland	515,918	83,942	87,169	687,049	23.14	12.35	3.52	17.84
Massachusetts	1,221,464	9,602		1,231,066	23.95	5.93		23.79
Michigan	742,314	6,799		749,113	87.89	163.22		88.38
Minnesota	171,864	259		172,123	2,775.06	709.38		2,760.87
Mississippi	353,901	773	436,631	791,305	19.68	16.88	40.90	30.47
Missouri	1,063,509	3,572	114,931	1,182,012	79.64	36.44	31.47	73.30
New Hampshire	325,579	494		326,073	2.56	5.00		2.55
New Jersey	646,699	25,318	18	672,035	38.92	6.33	92.37	37.27
New York	3,831,730	49,005		3,880,735	25.70	0.13		25.29
North Carolina	631,100	30,463	331,059	992,622	14.12	10.92	14.73	14.20
Ohio	2,302,838	36,673		2,339,511	17.79	41.12		18.14
Oregon	52,337	128		52,465	299.92	38.16		294.65
Pennsylvania	2,849,266	56,849		2,906,115	26.18	6.01		25.71
Rhode Island	170,668	3,932		174,620	18.62	7.68		18.35
South Carolina	291,388	9,914	402,406	703,708	6.13	10.65	4.53	5.27
Tennessee	826,782	7,300	275,719	1,109,801	9.24	13.67	15.14	10.68
Texas	421,294	355	182,566	604,215	173.51	10.58	213.89	184.22
Vermont	314,389	709		315,098	0.31	1.25		0.31
Virginia	1,047,411	58,042	490,865	1,596,318	17.06	6.83	3.83	12.29
Wisconsin	774,710	1,171		775,881	154.20	8.44		154.06
	26,706,425	476,536	3,950,531	31,148,047	37.37	12.30	23.44	35.04
TERRITORIES.								
Colorado	34,231	46		34,277				
Nakota	2,576			2,576				
Nebraska	28,759	67	15	28,841				
Nevada	6,812	45		6,847				
New Mexico	82,924	85		83,009	34.73			51.94
Utah	40,214	30	29	40,273	254.18		11.53	253.89
Washington	11,138	30		11,168				
District of Columbia	60,764	11,131	3,185	75,080	60.15	10.66	13.62	45.26
	26,973,843	487,970	3,953,760	31,443,322	37.97	12.33	23.39	35.59

a Indians.

[Preliminary report on the eighth census, page 131.]

The following table, showing the population of the States at the different decades, from 1790 to 1860, has been prepared by the editor with great care; and, as the numbers are taken from the census reports, he feels confident that it is correct:—

STATES.	1790.	1800.	1810.	1820.	1830.	1840.	1850.	1860.
Alabama.....			20,845	127,901	309,527	590,756	771,623	964,201
Arkansas.....				14,273	30,388	97,574	209,897	435,450
California.....							92,587	379,894
Connecticut.....	238,141	251,002	262,042	275,202	297,675	309,978	370,792	460,147
Delaware.....	59,096	64,273	72,674	72,749	76,748	78,085	91,532	112,216
Florida.....					54,730	54,477	87,445	140,425
Georgia.....	82,548	162,101	252,433	340,957	516,823	691,392	906,185	1,057,286
Illinois.....			12,282	55,211	157,445	476,183	851,470	1,711,951
Indiana.....		4,875	24,520	147,178	343,031	685,866	988,416	1,350,428
Iowa.....						43,112	192,214	674,913
Kansas.....								107,206
Kentucky.....	73,077	220,955	406,511	564,317	637,917	779,828	982,405	1,155,684
Louisiana.....			76,556	153,407	215,739	352,411	517,762	708,002
Maine.....	96,540	151,719	228,705	298,335	399,455	501,793	583,169	628,279
Maryland.....	319,728	341,548	380,546	407,350	447,040	470,017	583,034	687,049
Massachusetts.....	378,717	423,245	472,040	523,281	610,408	737,699	994,514	1,231,066
Michigan.....			4,762	8,896	31,639	212,267	397,654	749,113
Minnesota.....							6,077	172,123
Mississippi.....		8,850	40,352	75,448	136,621	375,651	606,526	791,305
Missouri.....			20,845	66,586	140,455	383,702	682,044	1,182,612
New Hampshire.....	141,899	183,762	214,360	244,161	269,328	284,574	317,976	326,073
New Jersey.....	184,139	211,949	245,555	277,575	320,823	373,306	429,555	632,035
New York.....	340,120	586,756	959,049	1,372,812	1,918,608	2,428,921	3,097,394	3,880,735
North Carolina.....	393,751	478,103	555,500	638,829	737,987	753,419	869,039	992,622
Ohio.....		45,365	287,760	581,434	937,903	1,519,467	1,980,339	2,339,511
Oregon.....							13,294	52,465
Pennsylvania.....	434,373	602,361	810,091	1,049,453	1,348,233	1,724,033	2,311,786	2,906,115
Rhode Island.....	69,110	69,122	77,031	83,059	97,199	108,830	147,545	174,620
South Carolina.....	249,073	345,591	415,115	502,741	581,185	594,398	668,507	703,708
Tennessee.....	35,791	105,602	261,727	422,813	681,904	829,210	1,002,717	1,109,801
Texas.....							212,592	604,215
Vermont.....	85,416	154,465	217,713	235,764	280,652	291,948	314,120	315,098
Virginia.....	748,308	880,200	974,622	1,065,379	1,211,405	1,238,797	1,421,661	1,596,318
Wisconsin.....						30,945	305,391	775,881
Total.....	3,929,827	5,291,832	7,215,791	9,605,192	12,826,186	17,025,741	23,067,262	31,148,047
TERRITORIES.								
Colorado.....								36,533
Dakota.....								2,576
Nebraska.....								28,841
Nevada.....								17,364
New Mexico.....							61,547	83,009
Utah.....							11,380	46,699
Washington.....								11,169
District of Columbia.....		14,093	24,023	33,029	39,834	43,712	51,687	75,080
Total.....	3,929,827	5,305,925	7,239,814	9,638,131	12,866,020	17,069,453	23,191,876	31,443,322

And see Story's Const., § 644, note 1 of 3d Ed., Preliminary report on the eighth census, pages 5 and 131.

Table showing the number of the Inhabitants of the States and Territories at each Census from 1790 to 1860, inclusive, and the number of Whites, Free Colored, and Slaves, respectively, together with the rate of increase of each class during the several decennial terms and for the whole period.

Aggregate population.	1790.	1800.	Rate per cent. of increase.	1810.	Rate per cent. of increase.	1820.	Rate per cent. of increase.	1830.	Rate per cent. of increase.	1840.	Rate per cent. of increase.	1850.	Rate per cent. of increase.	1860.	Rate per cent. of increase.	Rate per cent. of increase from 1790 to 1860.
Total population.....	3,929,827	5,305,925	35.02	7,239,814	36.45	9,638,181	33.13	12,866,020	33.49	17,069,453	32.67	23,191,876	35.87	31,443,322	35.59	700.16
Total white population	3,172,464	4,304,439	35.68	5,862,004	36.18	7,861,937	34.11	10,537,378	34.03	14,195,695	34.72	19,553,114	37.74	27,973,843	37.97	750.30
Total free colored pop.	59,466	108,395	82.23	186,446	72.00	233,524	25.23	319,599	36.87	386,303	20.87	434,449	12.46	487,970	12.33	720.65
Total free population..	3,231,930	4,412,834	36.54	6,048,450	37.06	8,095,461	33.84	10,856,977	34.11	14,581,998	34.31	19,987,563	37.07	26,461,813	37.40	747.66
Total slave population.	697,897	893,041	27.37	1,191,364	33.40	1,538,038	28.79	2,009,043	30.61	2,437,455	23.81	3,204,313	25.82	3,953,760	23.39	466.53
Total col'd population.	757,363	1,001,436	32.23	1,377,810	37.58	1,771,562	28.58	2,328,642	31.45	2,873,758	13.41	3,633,762	26.62	4,441,730	22.07	486.43

Total population in 1860, including Indian tribes.

Total population of the States and Territories.....	31,443,322
White population of Indian Territory west of Arkansas.....	1,988
Free colored population of Indian Territory west of Arkansas.....	404
Slave population of Indian Territory west of Arkansas.....	7,369
Population of Indian tribes (according to table on page 136).....	29,431
	<hr/>
	31,747,514

Preliminary report on the eighth census. Page 124.

How are
vacancies
filled?

[4.] When vacancies happen in the representation from any State, the executive authority thereof shall issue writs of election to fill such vacancies.

Upon what
does the
executive
act?

25. The executive of a State may receive the resignation of a member, and issue writs for a new election, without waiting to be informed by the house that a vacancy exists. *Mercer's Case*, Cl. & Hall, 44; *Edwards's Case*, Id. 92; *Newton's Case*, February, 1847.

Colonel Yell had not resigned; but had become a colonel of volunteers in the army in the war against Mexico, in 1846. The governor assumed that the two offices were incompatible; and, after a resolution by the Arkansas legislature to that effect, he issued a proclamation for an election to fill the vacancy. Thomas C. Newton was returned, and the house refused to consider the question of vacancy.

How are va-
cancies
created?

Vacancies, therefore, may be created by death, resignation, removal, or accepting incompatible offices. See *Paschal's Annotated Digest*, note 200; *Powell v. Wilson*, 16 Tex. 60; *The People v. Carrique*, 2 Hill 93; *Biencourt v. Parker*, 27 Tex. 562.

62, 151.

The acceptance of an incompatible office is an absolute determination of the original office. (*Rex v. Trelawney*, 3 Burr. 1616; *Millwood v. Thatcher*, 2 Tr. Rep. 87; *Wilcock on Municipal Corporation*, 240, 617; *Angel & Ames on Corporations*, 255;) *Biencourt v. Parker*, 27 Tex. 562.

Power of
choosing of-
ficers, and
of impeach-
ment.

[5.] The House of Representatives shall choose their Speaker and other officers, and shall have the sole power of impeachment.

What is the
Speaker?

26. The SPEAKER is the presiding officer of the House of Representatives, who is elected at the meeting of the first session of each Congress, and before there can be any organization. At the opening of the 34th and the 36th Congresses, there being three political parties represented, there were very great delays, as will be seen in the table. The Speaker has the appointment of all standing committees; and he becomes President of the United States in the absence of the Vice-President, and of the presiding officer of the Senate.

The Speakers have been:—

Name the
Speakers?

Con- gress.	Ses- sion.	Names of Speakers.	Election, or commence- ment of ser- vice.	Termination of service.	States of which they were rep- resentatives.
1	1	Fred. A. Muhlenberg.....	April 1, 1789	Mar. 3, 1791	Pennsylvania.
2	1	Jonathan Trumbull.....	Oct. 24, 1791	Mar. 2, 1793	Connecticut.
3	1	Fred. A. Muhlenberg.....	Dec. 2, 1793	Mar. 3, 1795	Pennsylvania.
4	1	Jonathan Dayton.....	Dec. 7, 1795	Mar. 3, 1797	New Jersey.
5	1	Jonathan Dayton.....	May 15, 1797	Mar. 3, 1799	do.
6	1	Theodore Sedgwick.....	Dec. 2, 1799	Mar. 3, 1801	Massachusetts.
7	1	Nathaniel Macon.....	Dec. 7, 1801	Mar. 3, 1803	N. Carolina.
8	1	Nathaniel Macon.....	Oct. 17, 1803	Mar. 3, 1805	do.
9	1	Nathaniel Macon.....	Dec. 2, 1805	Mar. 3, 1807	do.
10	1	Joseph B. Varnum.....	Oct. 26, 1807	Mar. 3, 1809	Massachusetts.
11	1	Joseph B. Varnum.....	May 22, 1809	Mar. 3, 1811	do.
12	1	Henry Clay.....	Nov. 4, 1811	Mar. 3, 1813	Kentucky.
13	1	Henry Clay.....	May 24, 1813	Jan. 19, 1814	do.
13	2	Langdon Cheves.....	Jan. 19, 1814	Mar. 2, 1815	S. Carolina.
14	1	Henry Clay.....	Dec. 4, 1815	Mar. 3, 1817	Kentucky.
15	1	Henry Clay.....	Dec. 1, 1817	Mar. 3, 1819	do.
16	1	Henry Clay.....	Dec. 6, 1819	Nov. 13, 1820	do.
16	2	John W. Taylor.....	Nov. 15, 1820	Mar. 3, 1821	New York.
17	1	Philip P. Barbour.....	Dec. 3, 1821	Mar. 3, 1823	Virginia.
18	1	Henry Clay.....	Dec. 1, 1823	Mar. 3, 1825	Kentucky.
19	1	John W. Taylor.....	Dec. 5, 1825	Mar. 3, 1827	New York.
20	1	Andrew Stevenson.....	Dec. 3, 1827	Mar. 3, 1829	Virginia.
21	1	Andrew Stevenson.....	Dec. 7, 1829	Mar. 3, 1831	do.
22	1	Andrew Stevenson.....	Dec. 5, 1831	Mar. 2, 1833	do.
23	1	Andrew Stevenson.....	Dec. 2, 1833	June 2, 1834	do.
23	1	John Bell.....	June 2, 1834	Mar. 3, 1835	Tennessee.
24	1	James K. Polk.....	Dec. 7, 1835	Mar. 3, 1837	do.
25	1	James K. Polk.....	Sept. 4, 1837	Mar. 3, 1839	do.
26	1	Robert M. T. Hunter.....	Dec. 16, 1839	Mar. 3, 1841	Virginia.
27	1	John White.....	May 31, 1841	Mar. 3, 1843	Kentucky.
28	1	John W. Jones.....	Dec. 4, 1843	Mar. 3, 1845	Virginia.
29	1	John W. Davis.....	Dec. 1, 1845	Mar. 3, 1847	Indiana.
30	1	Robert C. Winthrop.....	Dec. 6, 1847	Mar. 3, 1849	Massachusetts.
31	1	Howell Cobb.....	Dec. 22, 1849	Mar. 3, 1851	Georgia.
32	1	Linn Boyd.....	Dec. 1, 1851	Mar. 3, 1853	Kentucky.
33	1	Linn Boyd.....	Dec. 5, 1853	Mar. 3, 1855	do.
34	1	Nathaniel P. Banks.....	Feb. 2, 1856	Mar. 3, 1857	Massachusetts.
35	1	James L. Orr.....	Dec. 7, 1857	Mar. 3, 1859	S. Carolina.
36	1	William Pennington.....	Feb. 1, 1860	Mar. 3, 1861	New Jersey.
37	1	Galusha A. Grow.....	July 4, 1861	Mar. 3, 1863	Pennsylvania.
38	1	Schuyler Colfax.....	Dec. 7, 1863	Mar. 3, 1865	Indiana.
39	1	Schuyler Colfax.....	Dec. 4, 1865	Mar. 3, 1867	do.
40	1	Schuyler Colfax.....	Mar. 4, 1867		do.

The names of Speakers, *pro tem.*, who served temporarily, for one or more days, have been omitted. The delays of elections in the 34th and 36th Congresses were caused by political contests.

27. IMPEACHMENT.—We must look to the common law for the definition of impeachment. William Wirt, *Peck's Trial*, 499; *What is im-* James Buchanan, *Peck's Trial*, 437, 438. And see 1 Chase's *peachment?* Trial, 47, 48; 2 *Id.* 9-18; 4 Elliot's *Debates*, 262. It is designed as a method of national inquest into the conduct of public men. Story on the Const. § 689. To exhibit articles of accusation against a public officer before a competent tribunal. Burrill's *Law Dic.* **IMPEACHMENT.** It is a presentment by

the House of Commons, the most solemn grand inquest of the whole kingdom, to the House of Lords, the most high and supreme court of criminal jurisdiction of the kingdom. (2 Hale's Pl. of Cr. 150; 4 Blacks. Com. 259; 2 Wilson's Law. Lect. 165, 166; 2 Woodeson's Lect. 40, p. 596.) Story's Const. § 688. The objects, openness, and dignity of the proceeding. (Rawle, Const. 69, 137, 225, 236; 2 Elliott's Debates, 43-46.) Story's Const. §§ 688-9.

Pickering's
Case?

Judge Pickering was impeached, tried, convicted, and removed in his absence, and without counsel. His offense was, that he was deprived of reason. Farrar, § 169. The judgment was removal from office. Story's Const. § 803, note 1. For an enumeration of the impeachable crimes at common law, see 2 Woodeson's Lect. 40, p. 202; Com. Dig. L. 28-42; Story's Const. § 799-803.

193, 194.

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How and by
whom are
senators
chosen?

SEC. III.—[1.] The senate of the United States shall be composed of two senators from each state, chosen by the legislature thereof, for six years; and each senator shall have one vote.

Vote?

What are
the objects?

28. Consider the nature of the representation; the mode of appointment; the number of senators; their term of service; and their qualifications. 1 Story's Const. § 691. It makes the States

Why two for
each state?

equal in the senate. This result was obtained as a compromise, without which the Convention must have been dissolved. Curtis's Hist. of the Const. 41, 48, 100, 105, 106; 1 Story's Const. § 690-700; 2 Pitkin's Hist. 233, 245, 247, 248; 4 Elliot's Debates, 74-92; Id. 99-101; Id. 107, 108, 112-127; 2 Id. 233, 245; Luther Martin's Letter in 4 Elliot's debates, 1-45. The election by the

Why elected
by the Legis-
lature?

legislature was mainly to secure the coöperation of the State with the federal government. (The Federalist, Nos. 27, 62; 1 Kent's Com. Lect. 11, p. 211.) Story's Const. § 704.

How
elected?
30.

It was not fully settled whether the elections should be by joint or concurrent vote, until the act of Congress in these notes. (1 Rawle's Const. 37; 1 Kent's Com. Lect. 11 p. 211, 212.) The numbers considered. 1 Story's Const. § 706-708; 2 Curtis's Hist. of Const. passim. There was Hamilton's opinion in favor of tenure during good behavior. Curtis's Hist. of the Const. 100, 105; Story's Const. § 709, note 2 in 3d Ed. The advantages of the present system and the classification fully discussed; Id. § 709-727.

What was
Hamilton's
opinion?

Effect of two
votes?

Practically, the fact that each senator has one vote often divides the State upon questions of party interest.

What has
been the
practice?

29. Where the election is by a joint convention of the two houses of the legislature, it is not necessary that there should be a concurrent majority of each house in favor of the candidate declared to be elected. Cameron's Case, United States Senate, 13th March, 1857. The election, however, must be substantially by both houses, as distinct bodies. The mere fact that a majority of the joint body, or even of each body, is present, does not constitute the aggregate body a legislature, unless the two bodies, acting separately, have voted to meet, and have actually met accordingly.

Cameron's
case.

23, 30

Harlan's Case, United States Senate, 12th January, 1857; 10 Law Rep. 1-6. Harlan's case?

In the case of John P. Stockton, of New Jersey, in 1866, it was held that where the two bodies met in convention to elect a senator, and no one having, after numerous ballots, received a majority of the votes cast, and the convention then resolved to elect by plurality, and did so elect, it was not an election by the legislature, and Mr. Stockton was refused his seat. Senate Journal, 4th Dec., 1865; 8th Jan., 30th Jan., and 26th March, 1866. Stockton's case?

For the reasons which led to an equal representation in the senate, and for a longer term of service, see 2 Curtis's History of the Constitution, p. 138-141, 165, 166, 186, 217. This is one of the sections under which it has been urged that the right of the seceded States to representation in the senate is optional, absolute, and unqualified. While the precedent is that the reestablishment of the representation depends upon the reestablished loyalty of the State, and the ability of the senators elected to take the test oath. Why two senators?
46.
242.
275, 279.

30. The mode of election has now been settled by the following act:—

CHAP. CCXLV.—*An Act to regulate the Times and Manner of holding Elections for Senators in Congress.* July 25, 1866,
14 St., 243.

Be it enacted, &c., 1. That the legislature of each State which shall be chosen next preceding the expiration of the time for which any senator was elected to represent such State in Congress, shall, on the second Tuesday after the meeting and organization thereof, proceed to elect a senator in Congress, in the place of such senator so going out of office, in the following manner: Each house shall openly, by a viva voce vote of each member present, name one person for senator in Congress from said State, and the name of the person so voted for, who shall have a majority of the whole number of votes cast in each house shall be entered on the journal of each house by the clerk or secretary thereof; but if either house shall fail to give such majority to any person on said day, that fact shall be entered on the journal. At 12 o'clock, meridian, of the day following that on which proceedings are required to take place, as aforesaid, the members of the two houses shall convene in joint assembly and the journal of each house shall then be read, and if the same person shall have received a majority of all the votes in each house, such person shall be declared duly elected senator to represent said State in the Congress of the United States; but if the same person shall not have received a majority of the votes in each house, or if either house shall have failed to take proceedings as required by this act, the joint assembly shall then proceed to choose by a viva voce vote of each member present, a person for the purpose aforesaid, and the person having a majority of all the votes of the said joint assembly, a majority of all the members elected to both houses being present and voting, shall be declared duly elected; and if no person shall receive such majority on the first day, the joint assembly shall meet at twelve o'clock, meridian, What legis-
latures of
States and
when to
elect sena-
tors?
What is the
mode of elec-
tion?

of each succeeding day during the session of the legislature, and take at least one vote until a senator shall be elected.

What are the proceedings to elect a senator to fill a vacancy?

2. Whenever, on the meeting of the legislature of any State, a vacancy shall exist in the representation of such State in the Senate of the United States, said legislature shall proceed, on the second Tuesday after the commencement and organization of its session, to elect a person to fill such vacancy, in the manner herein-before provided for the election of a senator for a full term; and if a vacancy shall happen during the session of the legislature, then on the second Tuesday after the legislature shall have been organized and shall have notice of such vacancy.

How is the election certified?

3. It shall be the duty of the governor of the State from which any senator shall have been chosen as aforesaid to certify his election, under the seal of the State, to the President of the Senate of the United States, which certificate shall be countersigned by the Secretary of State of the State.

What is the classification?

[2.] Immediately after they shall be assembled, in consequence of the first election, they shall be divided, as equally as may be, into three classes. The seats of the senators of the first class shall be vacated at the expiration of the second year, of the second class at the expiration of the fourth year, and of the third class at the expiration of the sixth year, so that one-third may be chosen every second year; and if vacancies happen by resignation, or otherwise, during the recess of the legislature of any State, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies.

If vacancies occur?

by resignation, or otherwise, during the recess of the legislature of any State, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies.

Is the senate permanent?

31. The senate is a permanent body; its existence is continued and perpetual. Cushing's Law of Legislative assemblies, 19.

But should a majority of the States persistently refuse to elect senators, the government would come to an end. *Cohens v. Virginia*, 6 Wh. 264; 5 Cond. 106.

How vacated? Bledsoe's case.

32. The seat of a senator is vacated by a resignation addressed to the executive of a State, notwithstanding he may have received no notice that his resignation has been accepted. *Bledsoe's Case*, Cl. & Hall, 869.

Can the executive fill a prospective vacancy? Lanman's case.

33. It is not competent for the executive of a State, during the recess of the legislature, to appoint a senator to fill a vacancy which will happen, but has not happened at the time of the appointment. *Lanman's Case*, Cl. & Hall, 871.

How is the classification settled?

34. For a classification and list of senators, see *Hickey's Constitution*, 316-388. The classification is settled by lot when the senators first appear from a new State, in the mode adopted in the

first classification, so as to prevent two vacancies occurring in the same State at the same time. (Journals of Senate, 15th May, 1789, 25, 26, edition of 1820.) 1 Story's Const. § 509. The classification gives some analogy to the principle of two years tenure in the house of representatives, by the vacation of one-third of the terms every fourth of March. The whole number of States being now thirty-seven, the number of senators would be seventy-four; but ten States not being represented in the senate, there are only fifty-four senators

For what purpose?
How many senators?
46.
275, 279.

[3.] No person shall be a senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State for which he shall be chosen.

What are the qualifications of senators?

35. The term "PERSON" here is subject to the same criticism as to the qualifications of members of the house, and necessarily cannot be as comprehensive as "ALL OTHER PERSONS" in the 3d clause of the first section. See Farrar's Criticism, § 125-141. Words must receive their necessary signification and be construed according to the context, precedent and practice. "SENATOR" is sufficiently masculine, and is made certain by "he." See Gallatin's Case, Cl. & Hall, 851; Shield's Case, who was rejected for want of nine years' naturalization, "at the commencement of the term for which he was elected." See Senate Journal, from 5th to 15th March, 1849. Shields was re-elected, and returned to the senate at its next session—was qualified, and took his seat.

What is meant by person?
Is "senator" masculine?
16, 24, 46.
19.
Gallatin's case?
Shield's case?
93.
18.

[4.] The Vice-President of the United States shall be President of the Senate, but shall have no vote, unless they be equally divided.

Who is president of the senate?
168 a

36. VICE [prep.], in place of the president. Webster's Dic. VICE. The reasons for this officer presiding discussed. Story's Const. § 732-741. The question of the inherent powers of the vice-president is still open, it having been ruled in 1826, that he is without power, as presiding officer, except as it is given by the rules of the senate. Story's Const., § 739; 1 American Annual Register, 86, 87; 3 Id. 99; 4 Elliot's Debates, 311-315. By a rule of 1828, "every question of order shall be decided by the president without debate, subject to appeal to the senate." 3 Annual Reg. 99; Story's Const., § 740; 3 Jefferson's Manual, 15, 17.

What are the vice-president's powers?
38.

37. The following have been the vice-presidents: John Adams, from 4 March 1789 to 3 March 1797; Thos. Jefferson, from 4 March 1797 to 3 March 1801; Aaron Burr, from 4 March 1801 to 3 March 1805; George Clinton, from 4 March 1805 to 3 March 1813; Elbridge Gerry, from 4 March 1813 to 3 March 1817; Daniel D. Tompkins, from 4 March 1817 to 3 March 1825; John C. Calhoun,

Name the vice-presidents and their terms of office?

Vice Pres- from 4 March 1825 to 3 March 1833; Martin Van Buren, from 4
idents. March 1833 to 3 March 1837; Richard M. Johnson, from 4 March
1837 to 3 March 1841; John Tyler, from 4 March 1841 to 6 April
1841; George M. Dallas, from 4 March 1845 to 3 March 1849; Mil-
lard Fillmore, from 4 March 1849 to 10 July 1850; William R. King
was elected in 1852 and was sworn as vice-president in 1853, in
the island of Cuba, in accordance with act of 3d March, 1853. He
died in Cuba, having never presided. John C. Breckinridge, from
4 March 1857 to 3 March 1861; Hannibal Hamlin, from 4 March
1861 to 3 March 1865; Andrew Johnson, from 4 March 1865 to 14
April 1865, when he was sworn as president in consequence of the
assassination of Abraham Lincoln.

What officers [5.] The senate shall choose their other officers, and
do the senate also a president *pro tempore*, in the absence of the
choose? vice-president, or when he shall exercise the office of
172. President of the United States.
36.

When does 38. This presiding-officer, under an act of Congress, becomes the
the presiding President of the United States, in case of the death or disability of
officer be- the president and vice-president. 1 St. § 9, p. 240; Brightly's Dig.
come presi- 253. *Pro tempore* means for the time. But the law and practice
dent? is to elect a permanent presiding officer, who acts during the
172. absence of the vice-president, and when the vice-president becomes
168 a. President of the United States. The following is a list of these
26. presiding officers, or presidents *pro tempore* :—

Name the presiding officers.	Names of Presidents <i>pro tem- pore</i> of the Senate.	Attended.	Retired.
	John Langdon	6 April 1789.	21 April 1789
	John Langdon	7 Aug. 1789.	19 Aug. 1789
	Richard Henry Lee	18 April 1792.	8 May 1792
	John Langdon	5 Nov. 1792.	4 Dec. 1792
	John Langdon	1 Mar. 1793	3 Mar. 1793
	John Langdon	4 Mar. 1793.	4 Mar. 1793
	Ralph Izard	31 May 1794.	9 June 1794
	Ralph Izard	3 Nov. 1794.	9 Nov. 1794
	Henry Tazewell	20 Feb. 1795.	3 Mar. 1795
	Henry Tazewell	7 Dec. 1795	8 Dec. 1795
	Samuel Livermore	6 May 1796.	1 June 1796
	William Bingham	16 Feb. 1797.	3 Mar. 1797
	William Bradford	6 July 1797.	10 July 1797
	Jacob Read	22 Nov. 1797.	12 Dec. 1797
	Theodore Sedgwick	27 June 1798.	16 July 1798
	Theodore Sedgwick	17 July 1798.	17 July 1798
	John Lawrence	6 Dec. 1798.	26 Dec. 1798
	James Ross	1 Mar. 1799.	3 Mar. 1799
	Samuel Livermore	2 Dec. 1799.	29 Dec. 1799
	Uriah Tracy	14 May 1800.	14 May 1800
	John Eager Howard	21 Nov. 1800.	27 Nov. 1800
	James Hillhouse	28 Feb. 1801.	3 Mar. 1801

<i>Names of Presidents pro tempore of the Senate.</i>	<i>Attended.</i>	<i>Retired.</i>
Abraham Baldwin.....	7 Dec. 1801.....	14 Jan. 1802
Abraham Baldwin.....	17 April 1802.....	3 May 1802
Stephen R. Bradley.....	14 Dec. 1802.....	18 Jan. 1803
Stephen R. Bradley.....	25 Feb. 1803.....	25 Feb. 1803
Stephen R. Bradley.....	2 Mar. 1803.....	3 Mar. 1803
John Brown.....	17 Oct. 1803.....	6 Dec. 1803
John Brown.....	23 Jan. 1804.....	9 Mar. 1804
Jesse Franklin.....	10 Mar. 1804.....	27 Mar. 1804
Joseph Anderson.....	15 Jan. 1805.....	
Joseph Anderson.....	28 Feb. 1805.....	2 Mar. 1805
Joseph Anderson.....	2 Mar. 1805.....	3 Mar. 1805
Samuel Smith.....	2 Dec. 1805.....	15 Dec. 1805
Samuel Smith.....	18 Mar. 1806.....	21 April 1806
Samuel Smith.....	2 Mar. 1807.....	3 Mar. 1807
Samuel Smith.....	16 April 1808.....	25 April 1808
Stephen R. Bradley.....	28 Dec. 1808.....	
John Milledge.....	30 Jan. 1809.....	3 Mar. 1809
John Milledge.....	4 Mar. 1809.....	7 Mar. 1809
Andrew Gregg.....	26 June 1809.....	28 June 1809
Andrew Gregg.....	27 Nov. 1809.....	18 Dec. 1809
John Gaillard.....	28 Feb. 1810.....	
John Gaillard.....	17 April 1810.....	1 May 1810
John Gaillard.....	3 Dec. 1810.....	11 Dec. 1810
John Pope.....	23 Feb. 1811.....	3 Mar. 1811
William H. Crawford.....	24 Mar. 1812.....	6 July 1812
William H. Crawford.....	2 Nov. 1812.....	3 Mar. 1813
Joseph B. Varnum.....	6 Dec. 1813.....	3 Feb. 1814
John Gaillard.....	18 April 1814.....	18 April 1814
John Gaillard.....	19 Sept. 1814.....	2 Mar. 1815
John Gaillard.....	4 Dec. 1815.....	30 April 1815
John Gaillard.....	2 Dec. 1816.....	3 Mar. 1817
John Gaillard.....	4 Mar. 1817.....	6 Mar. 1817
John Gaillard.....	1 Dec. 1817.....	18 Feb. 1818
John Gaillard.....	31 Mar. 1818.....	20 April 1818
John Gaillard.....	16 Nov. 1818.....	5 Jan. 1819
James Barbour.....	15 Feb. 1819.....	3 Mar. 1819
James Barbour.....	6 Dec. 1819.....	26 Dec. 1819
John Gaillard.....	25 Jan. 1820.....	15 May 1820
John Gaillard.....	13 Nov. 1820.....	3 Mar. 1821
John Gaillard.....	3 Dec. 1821.....	27 Dec. 1821
John Gaillard.....	1 Feb. 1822.....	8 May 1822
John Gaillard.....	2 Dec. 1822.....	2 Dec. 1822
John Gaillard.....	19 Feb. 1823.....	3 Mar. 1823
John Gaillard.....	1 Dec. 1823.....	20 Jan. 1824
John Gaillard.....	21 May 1824.....	27 May 1824
John Gaillard.....	6 Dec. 1824.....	3 Mar. 1825
John Gaillard.....	9 Mar. 1825.....	9 Mar. 1825
Nathaniel Macon.....	20 May 1826.....	20 Mar. 1825
Nathaniel Macon.....	2 Jan. 1827.....	13 Feb. 1827
Nathaniel Macon.....	2 Mar. 1827.....	3 Mar. 1827

<i>Names of Presidents pro tem- pore of the Senate.</i>	<i>Attended.</i>	<i>Retired.</i>
Samuel Smith	15 May 1828.....	26 May 1828
Samuel Smith.....	1 Dec. 1828.....	21 Dec. 1828
Samuel Smith.....	13 Mar. 1829.....	17 Mar. 1829
Samuel Smith.....	7 Dec. 1829.....	13 Dec. 1829
Samuel Smith.....	29 May 1830.....	31 May 1830
Samuel Smith.....	6 Dec. 1830.....	2 Jan. 1831
Samuel Smith.....	1 Mar. 1831.....	3 Mar. 1831
Samuel Smith.....	5 Dec. 1831.....	11 Dec. 1831
Littleton W. Tazewell	9 July 1832.....	16 July 1832
Hugh Lawson White	3 Dec. 1832.....	2 Mar. 1833
Hugh Lawson White	2 Dec. 1833.....	15 Dec. 1833
George Poindexter	28 June 1834.....	30 June 1834
John Tyler.....	3 Mar. 1835.....	3 Mar. 1835
William R. King.....	1 July 1836.....	4 July 1836
William R. King.....	28 Jan. 1837.....	3 Mar. 1837
William R. King.....	7 Mar. 1837.....	10 Mar. 1837
William R. King.....	13 Sept. 1837.....	12 Sept. 1837
William R. King.....	2 July 1838.....	16 Oct. 1837
William R. King.....	3 Dec. 1838.....	18 Dec. 1838
William R. King.....	25 Feb. 1839.....	3 Mar. 1839
William R. King.....	2 Dec. 1839.....	26 Dec. 1839
William R. King.....	3 July 1840.....	21 July 1840
William R. King.....	7 Dec. 1840.....	15 Dec. 1840
William R. King.....	2 Mar. 1841.....	3 Mar. 1841
William R. King.....	4 Mar. 1841.....	4 Mar. 1841
Samuel L. Southard	11 Mar. 1841.....	15 Mar. 1841
Samuel L. Southard	31 May 1841.....	13 Sept. 1841
Samuel L. Southard	6 Dec. 1841.....	30 May 1842
Willie P. Mangum.....	31 May 1842.....	31 Aug. 1842
Willie P. Mangum.....	5 Dec. 1842.....	3 Mar. 1843
Willie P. Mangum.....	4 Dec. 1843.....	17 June 1844
Willie P. Mangum.....	2 Dec. 1844.....	3 Mar. 1845
Willie P. Mangum.....	4 Mar. 1845.....	4 Mar. 1845
David R. Atchison.....	8 Aug. 1846.....	10 Aug. 1846
David R. Atchison.....	11 Jan. 1847.....	14 Jan. 1847
David R. Atchison.....	3 Mar. 1847.....	3 Mar. 1847
David R. Atchison.....	2 Feb. 1848.....	8 Feb. 1848
David R. Atchison.....	1 June 1848.....	14 June 1848
David R. Atchison.....	26 June 1848.....	29 June 1848
David R. Atchison.....	29 July 1848.....	14 Aug. 1848
David R. Atchison.....	4 Dec. 1848.....	4 Dec. 1848
David R. Atchison.....	26 Dec. 1848.....	1 Jan. 1849
David R. Atchison.....	2 Mar. 1849.....	3 Mar. 1849
David R. Atchison.....	5 Mar. 1849.....	23 Mar. 1849
William R. King	6 May 1850.....	19 May 1850
William R. King	11 July 1850.....	30 Sept. 1850
William R. King	2 Dec. 1850.....	3 Mar. 1851
William R. King	1 Dec. 1851.....	31 Aug. 1852
William R. King	1 Dec. 1852.....	20 Dec. 1852
David R. Atchison.....	20 Dec. 1852.....	3 Mar. 1853

<i>Names of Presidents pro tempore of the Senate.</i>	<i>Attended.</i>	<i>Retired.</i>
David R. Atchison.....	5 Dec. 1853.....	7 Aug. 1854
Jesse D. Bright	4 Dec. 1854.....	3 Mar. 1855
Jesse D. Bright	3 Dec. 1855.....	8 Aug. 1856
Jesse D. Bright	21 Aug. 1856.....	30 Aug. 1856
Jesse D. Bright	2 Dec. 1856.....	5 Jan. 1857
James M. Mason.....	5 Jan. 1857.....	3 Mar. 1857
Benjamin Fitzpatrick.....	29 Mar. 1858.....	4 May 1858
Benjamin Fitzpatrick.....	24 Jan. 1859.....	10 Feb. 1859
Solomon Foote.....	18 July 1861.....	6 Aug. 1861
Solomon Foote.....	31 Mar. 1862.....	21 May 1862
Solomon Foote.....	20 June 1862.....	17 July 1862
Solomon Foote.....	18 Feb. 1863.....	4 Mar. 1863
Daniel Clark.....	25 April 1864.....	4 July 1864
Daniel Clark.....	9 Feb. 1865.....	19 Feb. 1865
La Fayette S. Foster	7 Mar. 1866.....	28 July 1866
La Fayette S. Foster	13 Dec. 1867.....	3 Mar. 1867
Benjamin F. Wade.....	4 Mar. 1867.....	4 Mar. 1869

[6.] The senate shall have the sole power to try all ^{How are im-} impeachments. When sitting for that purpose, they ^{peachments} shall be on oath or affirmation. When the President ^{tried?} of the United States is tried, the Chief-Justice shall preside; and no person shall be convicted without the concurrence of two-thirds of the members present. ^{Two thirds?}

39. For the doctrine of impeachment, see Peck's Trial, speeches ^{27, 191-194.}

for the prosecution and defence; Reports and Debates on the Impeachment of the President, December, 1867. A judgment of impeachment in the English House of Lords requires that at least twelve of the members should concur in it; and "a verdict by less than twelve would not be good." Com. Dig. Parliament. L.

17. The reasons why this power of impeachment was given to the senate are fully discussed in the Federalist, and in Story on the ^{36, 37.}

Const., and Rawle on the Const. Story's Const., § 743-775, and notes. The interest of the vice-president is supposed to disqualify him. Story's Const., § 777. For the action of the senate upon ^{Where are} impeachment see the journal or record of the senate on trials of ^{the impeach-} impeachment, from March 4, 1780, to March 3, 1851: 1. On the ^{ment trials} trial of William Blount, a senator of the United States, from ^{to be found?} December 17, 1798, to January 15, 1799; 2. On the trial of John Pickering, Judge of the New Hampshire District, from March 3, 1803, to March 12, 1803; 3. On the trial of Samuel Chase, one of the Associate Justices of the Supreme Court of the United States, from November 30, 1804, to March 1, 1805. The preceding cases will be found as an appendix to the third volume of the Legislative Journal of the Senate; 4. On the trial of James H. Peck, Judge of the Missouri District, from May 11, 1830, to May 25, 1830; and from December, 13, 1830, to January 31, 1831. The

319.

proceedings in this case will be found as an appendix to the Legislative Journal of the Senate of 1830, 1831, and also in volumes called Peck's Trial, Blount's Trial, Pickering's Trial, and Chase's Trial. For the mode of trial in cases of impeachment, see Story's Const., § 807-810; 2 Woodeson's Lect., 40, p. 603, 604; Jefferson's Manual, § 53.

What is the oath of the Senators? The form of oath adopted by the Senate in Chase's case was as follows: "You solemnly swear or affirm, that in all things appertaining to the trial of the impeachment of —, you will do impartial justice according to the Constitution and laws of the United States." (Chase's Trial, vol. 1, p. 12.) Report upon the impeachment of the President, 62.

What is the question? The question in Pickering's Case was: "Is John Pickering, district judge of the district of New Hampshire, guilty as charged in the — article of the impeachment exhibited against him by the House of Representatives?" Annals 2d Session 8th Cong. 364. In Chase's trial it was: "Mr. —, how say you; is the respondent, Samuel Chase, guilty or not guilty of a high crime or misdemeanor, as charged in the article of impeachment?" Ibid 2d Session 8th Congress, 564.)

What is the judgment in impeachment? [7.] Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold or enjoy any office of honor, trust, or profit, under the United States; but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment, and punishment, according to law.

What means judgment? **40. JUDGMENT** here means the conclusion of law from the facts found upon the charges preferred by the House. In the trial of Judge Peck for having disbarred a lawyer, the defence was mainly rested upon the right of the court to punish for contempt, and the want of malice in the judge. Peck's Trial. Some have questioned whether if the defendant be found guilty, the judgment can be *less* than removal from office. Story's Const. 803. Shall not extend *further*, does not mean shall not *exceed* or *fall short*, but be exactly removal and *disqualification*, and nothing else. Farrar, p. 434., note 1.

Can the judgment be short of removal? In England the punishment extends to the whole punishment attached by law to the offense. (Comyn's Dig. Parliament, L. 44; 2 Woodeson, Lect, 40. p. 611-614), Story's Const., § 784. The sentence is limited to political punishment, and the party left to a trial for the criminal violation of the law by a jury. Story's Const. § 786.

How far does the sentence extend? **DISQUALIFICATION.**—The punishment touches neither his person nor property; but simply divests him of his political capacity. Mr. Bayard, Blount's trial, 47-68, Phila., 1799. Id. 82. Story's Const., § 803.

SEC. 4. [1.] The times, places, and manner of holding elections for senators and representatives, shall be prescribed in each State by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing senators.

Who pre-
scribes the
times and
places of
elections?

17

18

41. When the legislature of a State has failed to "prescribe the times, places, and manner" of holding elections, as required by the Constitution, the governor may, in case of a vacancy, in his writ of election, give notice of the time and place of election; but a reasonable time ought to be allowed for the promulgation of the notice. Hoge's Case, Cl. & Hall, 135.

What is the
power of the
governor?

This power of Congress has only been exercised so far as to require the States to elect by districts, by the act of 1842, ch. 47. (See Barnard's Protest, in December, 1843, and the debates of that session,) and the election of Senators already referred to. These acts relate to the *manner* of elections, and the *places* so far as the legislative halls are concerned in the election of senators. There are those who contend that, under this power, the general powers, and the thirteenth and fourteenth amendments, and the general frame-work of the government, Congress may determine *who* shall vote at the elections for representatives; but whatever may be said of other powers, the more settled opinion seems to be, that the *times* relate to the days, the *places* to the precincts for voting, and the *manner* to the *viva voce* or ballot system, and the regulations for conducting the elections.

How far has
this power
of Congress
been exer-
cised?

30

274, 275.

What is
meant by
time, place,
and manner?

274-279.

16-18.

When Congress legislates on these points, the legislative "regulations," (which relate back to those three things) will cease. Congress only has a superintending control. 1 Story's Const. § 815-828. It cannot be said, with any correctness, that Congress can, in any way, alter the rights or qualifications of voters. 1 Story's Const., § 820. But it was argued differently by those who opposed the ratification of the Constitution. Little was said in the Conventions., The Federalist, Nos. 59, 60; 1 Elliot's Debates, 45-44, 67 68; 3 Id. 65. The Editor would say that the practice of the States as to inappropriate times, the vacancies which exist when sessions are called, and the experience in regard to secession and rebellion render expedient that Congress should fix upon some rule of uniformity.

What is the
power of
Congress
over the
subject?

17, 18.

329, 330,
331.

As to the place of "choosing senators." This means that Congress shall not say *where* the legislature shall sit. Story's Const., § 828, note 2. The arguments of those who contend for the power of Congress to determine *who* may vote, and who shall not be disfranchised, have been presented by Mr. Farrar, § 124-141. It is now one of the irritating questions.—Ed.

30

17, 18.

[2.] The Congress shall assemble at least once in every year: and such meeting shall be on the first

What are
the Sessions
of Congress?

333. Monday in December, unless they shall by law appoint a different day.

When expire ? 42. The constitutional term of Congress does not expire until twelve o'clock at noon on the 4th of March. 11 Stat. Appendix ii.

Act of 22 Jan., 1867. 14 St. 378. 43. "In addition to the present regular times of the meeting of Congress, there shall be a meeting of the Fortieth Congress of the United States, and of each succeeding Congress thereafter, at 12 o'clock meridian, on the fourth day of March, the day on which the term begins for which the Congress is elected, except that when the fourth of March occurs on Sunday, then the meeting shall take place at the same hour on the next succeeding day."

When are the times of meetings ?

When and for how long ?

333.

So that each Congress is now divided into three sessions: The first commences on the fourth day of March, and may continue its session until the first Monday in December; the second commences on the first Monday in December, and may continue until the next first Monday in December; the third commences on the first Monday in December, and must adjourn on the next fourth day of March, by the dissolution of the Congress.

What are the powers of each House ?

334.
348.

SEC. V.—[1.] Each house shall be the judge of the elections, returns, and qualifications of its own members; and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner, and under such penalties, as each house may provide.

What are election returns and qualifications ?
16-18, 29, 30, 41.

44. THE ELECTIONS in a general sense, means the right to determine who has been chosen by the "qualified electors" at the "times and places" and *returned*, according to "the regulations" prescribed by the laws of the States or by Congress wherein they shall have been superseded. Each case usually depends upon its own facts; and the object generally has been to ascertain who has received the highest number of lawful votes. The necessity and importance of this power discussed. Story's Const. § 833.

The returns?

45. THE RETURNS from the State authorities are *prima facie* evidence only of an election, and are not conclusive upon the house. Spaulding v. Mead, Cl. & Hall, 16, 18, 29, 30, 41, 157; Reed v. Cosden, Id. 353. And the refusal of the executive of a State to grant a certificate of election, does not prejudice the right of one who may be entitled to a seat. Richard's Case, Id. 95.

What of the qualifications?
19, 41, 35,

335.

46. The "QUALIFICATIONS," in its narrower sense, would doubtless relate to the *age*, *citizenship*, and *inhabitaney* of the applicant as defined in the second clause of section 2, art. 1, and the third clause of section three of the same. But as the term "PERSON," if taken alone, in both might include a female, a lunatic or an idiot, a convicted felon, a person of notoriously bad character, or actually

at war with the United States, as during the rebellion, or one coming from a State all of whose inhabitants are at war with the United States, the term "*qualifications*" has, in practice, 275, 279. received a more enlarged signification. Thus in the case of Mr. Niles, in 1846, a committee was raised, in the senate, to inquire into his mental capacity; the rebellion has caused a test oath, which might reach persons in all the States, and does embrace 242. majorities in some of them; a concurrent resolution was passed 70. in 1866, in regard to the States lately in rebellion, which, it was urged, limited this independent power of each house; the fourteenth amendment of the Constitution looks to a new *disqualifica-* 275-279. *tion*, and all the reconstruction acts, it has been argued, intrench upon this right. At the time of this writing one committee is investigating the subject of the *disqualifications* of certain members from Kentucky, and another the question as to whether Maryland has a "republican form of government" within the 233. meaning of the Constitution.

It may be pretty strongly inferred from messages and speeches of President JOHNSON, and certainly it has been very clearly expressed by some of the opposition statesmen in the senate and house, that after the acts of reconstruction, that is, the formation of amended constitutions and elections under the proclamations of the President, the "*persons*" so chosen were entitled to their seats without any superadded "*qualifications*" to those prescribed in this 277-279. section, except the fact that they are "loyal men from loyal States."

But the statesmen of the majority argue, that while these States and these very members *elected* and *returned*, and the great bodies of their constituents were claiming to be aliens to the United States, and magistrates and people were engaged in war to resist the authority of the government, they were not entitled to representation; and *a fortiori* they cannot send members with the proper "*qualifications*" until the law-making power shall determine 233. upon the terms of restoration; and that, certainly, the test oath is a superadded *disqualification*, which the president's pardon cannot 242. overcome. On the other hand, it has been argued that, as that oath has been decided to be unconstitutional in some cases, it is so as to 177. members who are willing to swear to support the Constitution; that 142, 143. the president's pardon does remove all political disabilities; and 242. therefore, the test oath cannot apply to those who had been pardoned for their participation in the rebellion; and that the action of the people, under the authority of the president, restores those States and the citizens thereof, to all their rights, *in statu quo ante bellum*. These are the general arguments, for and against. The whole subject is a case not discussed in the formation of the Constitution; it is without precedent, because the frame-work of our government differs from all others; therefore, the difficult problem 275-285. must be worked out under its peculiar circumstances.

It is not within the plan of this work to give the opinions of the Editor. It may not be improper to remark, however, that there seems to be more difference as to *who* shall accomplish the work of restoration than *what* shall be done to accomplish it. All seem to

Seceded
States.

agree that there *was* a time when the seceded States could not properly send members, even though such members possessed the constitutional *qualifications*; yet upon this the Constitution is silent. So the words *disloyalty* and *loyalty* are not in it. *Necessity* had to determine that those at war with the government could not vote on the question of supplies. But the time *when*, the power *which*, and the questions *how* and to *whom* political rights shall be restored or given, and indeed how far they are lost, are the matters of difference. Of course the actors in the drama, who believe that the ordinances of secession made the seceding States foreign and independent nations, and all the citizens who remained therein aliens, and during the war alien enemies; that the "Confederate States" became a lawful belligerent power, which was only forced "to yield to superior numbers and means," have a kind of *estoppel in limine*, for which there is no other answer than that the friends of the United States held and have established the opposite theory.

209.

The great misfortune in this and all political controversies is, that in discussions men neither weigh well nor define their words.

I can only pray that, in future editions, facts and precedents may enable the Editor to give the exact signification of terms.

What are the
powers of
each house?

349-351.

[2.] Each house may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member.

Where are
the rules to
be found?

349.

47. The "RULES" will be found in "Jefferson's Manual," and in the published manuals of each house. See Barclay's Digest; the standing rules printed by Francis Childs, in 1795; Jefferson's Manual; Dwarris on Statutes, 291; Hastel's Precedents; May's Treatise upon the Law, &c., of Parliament; Cushing's Rules of Proceeding, Debate, &c. All these works should be carefully studied by leading and efficient members of Parliamentary bodies. 1 Kent's Com. 238, and notes to 11th edition, where will be found an epitome of the rules.

What is the
power as to
contempts?

350.

48. This does not exclude the power to punish for contempts others than members of the house. The Constitution says nothing of contempts. These were left to the operation of the common law principle, that all courts have a right to protect themselves from insult and contempt, without which right of self-protection, they could not discharge their high and important duties. Nugent's Case, 1 Am. L. J. 139; Anderson v. Dunn, 6 Wh. 204; 1 Story's Const. §§ 845-9; Bolton v. Martin, 1 Dall. 296; Sam. Houston's Case, 11 vol. of Benton's Condensed Debates, pp. 644, 658, where the whole case for striking Stanberry for words spoken in debate is given. This was a contempt not committed in the presence of the House, but upon the avenue, for words spoken and published. Houston was not a member of the House, and was punished by reprimand. Punishment for a breach of privilege should only be inflicted in cases of strong necessity. (Jarvis's Case, and Randolph & Whitney's Case); Houston's Case, 11 Benton's Debates 658.

Whatever may have a tendency to impair the freedom of debate, or to detract from the independence of the representatives of the people, is a breach of privilege. *Id.* 669. See the question discussed. Jefferson's Manual; Tucker Blackstone App. note 200, 205; 1 Story on the Const. § 845-850, 3 ed.

49. It seems to be settled that a member may be expelled for any misdemeanor which, though not punishable by any statute, is inconsistent with the trust and duty of a member. Blount's Case, 1 Story's Const. § 838; Smith's Case, 1 Hall's L. J. 459; Brooks' Case, for assaulting Senator Sumner in the Senate Chamber, for words spoken in debate. It extends to all cases where the offense is such, as in the judgment of the House, unfits him for parliamentary duties. (1 Bl. Com. 163; *Id.* Christian's note, 167; *Rex v. Wilkes*, 2 Wilson's R. 251; Com. Dig. Parliament G. 5; 1 Hall's Law Journ., 459, 466). 1 Story's Const. § 838.

Defined.

For what may a member be expelled?

193, 194.

351.

352.

The Sergeant-at-arms has no authority to arrest by deputy. *F. B. Sandborn's Case*, 1 Kent's Com. 11 ed. 236, note 2.

The power to punish for contempt is inherent in all legislative assemblies. 1 Kent's Com. 236. This has been denied in England. (*Kelly v. Carson*, 4 Moore Privy Council; 63 Fenton v. Hampton, 11 *Id.* 347). *Id.*; *Rex v. Flower*, 8 T. 314; *Yates v. Lansing*, 9 John. 417. And see 1 Story's Const. 3d ed. § 845, 850, and his notes which exhaust the authorities.

Whence are the powers derived?

William Blount was expelled for an attempt to seduce an United States interpreter from his duty, and to alienate the affections and confidence of the Indians from the public officers residing among them, &c. (Journals of the Senate, 8th July, 1797; *Serg. Const. Ch. 28*, p. 286), Story's Const. § 804.

193, 194.

50. On the 14th March, 1861, the Senate passed the following resolution: "Whereas the seats of Albert G. Brown and Jefferson Davis of Miss., Stephen R. Mallory of Florida, Clement C. Clay, jr. of Ala., Robt. Toombs of Ga., and Judah P. Benjamin of Louisiana, having become vacant: Therefore, *Resolved*, that the Secretary be directed to omit their names respectively from the roll." Senate Journal, 14 March, 1861. Jesse D. Bright of Indiana, was also expelled for treasonable correspondence with Jefferson Davis. Senate Journal, 1 March, 1861.

Who were expelled for participation in the rebellion?

353.

[3.] Each house shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may, in their judgment, require secrecy; and the yeas and nays of the members of either house, on any question, shall, at the desire of one-fifth of those present, be entered on the journal.

What is the rule as to Journals?

Yeas and nays?

51. The object is to ensure publicity. Story's Const. § 840. These journals have been published in various editions and are valuable sources of information.

What is the object of the journal?

Yeas and nays?

"YEAS AND NAYS" are simply a call for the record of each member's vote upon the questions stated by the Speaker.

State the power of adjournments.

[4.] Neither House, during the session of Congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two houses shall be sitting.

What is the object of the power?

52. This places Congress independent of the President, except in cases of disagreement. Story's Const. § 843.

How of compensation?

SEC. VI.—[1.] The Senators and Representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the treasury of the United States. They shall, in all cases, except treason, felony, and breach of the peace, be privileged from arrest, during their attendance at the session of their respective houses, and in going to, and returning from the same; and for any speech or debate in either House, they shall not be questioned in any other place.

What is the compensation of members?

53. COMPENSATION.—The rate of compensation or pay has been several times increased to meet the exigencies of the diminished value of money. 1 Story's Const. § 858. It is now five thousand dollars per annum for the Senators and Representatives, and eight thousand dollars for the Speaker; and twenty cents a mile, by the nearest usually traveled route. 14 St. p. 323 § 17.

The members of the British Parliament receive no compensation. (1 Blackst. Com. 174, and Christian's note 34); Story's Const. § 853. The subject is one on which there was much division in the Convention. (Journal of the Convention, 67, 116-119, 142-151; 2 Elliot's Debates, 279, 280; 4 Elliot's Debates, 92-99. The reasons for and against discussed. Rawle on the Const. ch. 18, p. 179); Story's Const, § 854-858. See Confederation, *ante* Art. V., p. 11.

How fixed? And why?

53.

54. "TO BE ASCERTAINED BY LAW," removes the subject from the pride and parsimony, the local prejudices and local habits of any section of the Union. (3 Elliot's Debates, 279.) Story's Const. § 857.

What are their privileges?

43.

55. THIS PRIVILEGE, which means freedom from arrest, has belonged to all legislative bodies on the Continent, and immemorially to the English Parliament. (1 Black. Com. 164, 165; Com. Dig. Parliament D. 17; Jefferson's Manual, § 3, *Privilege*; Benyon v. Evelyn, Sir O. Bridge. R. 334.) 1 Story on Const. §

859. It could not be surrendered without endangering the public liberties, as well as the private independence of the members. (1 Kent's Com. Lect. 11. Bolton v. Martin, Dallas 296. Coffin v. Coffin, 4 Mass., R. 1) Story's Const. § 869. See *Ante* Art. V., p. 11.

It is not merely the privilege of the member or his constituents, but the privilege of the House also. And every man must at his peril take notice who are the members of the house returned of record. (4 Jefferson's Manual, 4), 1 Story's Const. § 860.

56. "TREASON, FELONY, OR BREACH OF THE PEACE." This From what would seem to extend to all indictable offenses, as well those which offences? are in fact attended with force and violence, as those which are only constructive breaches of the peace of the government, inas-much as they violate its good order. 1 Bl. Com. 166; 1 Story's Const. § 865. The words were borrowed from the common law, 14 Inst. 25; 1 Black. Com. 165; Com. Dig. Parliament D. Breaches of the peace include libels. Rex v. Wilkes, 2 Wilson's R. 151.) Story's Const. § 865. 192, 194.

57. ARREST. They are privileged not only from arrest, both on From what judicial and mesne process, but also from the service of a summons arrest privi- or other civil process, while in attendance on their public duties. leged? Geyer's Lesse v. Irwin, 4 Dall. 107; Nones v. Edsall, 1 Wall. Jr. 191; 1 Story's Const. § 860; Cox v. McClenachan, 3 Dall. 478. Jefferson's Manual, § 3 and 4.

The privilege is personal and does not extend to servants or property. It is only for a reasonable time, *eundo, morando, et ad propria redeundo*. (Holliday v. Pitt, 2 Str. R. 985; S. C. Cas. Temp. Hard. 28; 1 Black. Com. 165, Christian's note 21; Barnard v. Mordaunt, 1 Kenyon R. 125; 4 Jeff. Manual, § 3); Story's Const. § 861, 862, 864.

58. THE EFFECT of the arrest is, that it is a trespass *ab initio*, What is the actionable and indictable, and punishable as a contempt of the house. effect of the arrest? (1 Black. Com. 164–166; Com. Dig. Parliament D. 17; Jefferson's Manual, § 3.) Story's Const. § 863. The member may also be discharged by motion to a court of justice, or upon a writ of *habeas corpus*. (Jefferson's Manual, § 3; 2^d Str. 990; 2 Wilson's R. 151; Cas. Temp. Hard. 28). 1 Story's Const. § 863.

59. The privilege from arrest commences from the election and When does it before the member takes his seat or is sworn. (Jefferson's Manual, commence? § 3; but see Comyn's Dig. Parliament D. 17.) Story's Const. § 864.

60. One who goes to Washington duly commissioned to repre- In whose fa- sent a State in Congress, is privileged from arrest, *eundo, morando et vor? redeundo*; and though it be subsequently decided by Congress, that he is not entitled to a seat there, he is protected until he reaches home, if he return as soon as possible after such decision. Dunton v. Halstead, 4 Penn. L. J. 237.

61. "AND FOR ANY SPEECH OR DEBATE IN EITHER HOUSE THEY SHALL NOT BE QUESTIONED IN ANY OTHER PLACE." What is free dom of de- bate? 246, 247.

This secures the freedom of debate. (2 Wilson's Law Sect. 156; 1 Black. Com. 164, 165.) Story's Const. § 866.

But this privilege is strictly confined to words spoken in the course of parliamentary proceedings, and does not cover things done beyond the place and limits of duty. (Jefferson's Manual, § 3) Story's Const. 866.

The privilege does not cover the publication of the speech by the member. (The King v. Creevy, 1 Maule and Selw. 273. Coffin v. Coffin, 4 Mass. R. 1.) But see Houston's Case (Doddridge and Burgess Speeches in 1832). Story on Const. § 866.

From what offices are senators and representatives excluded? [2.] No senator or representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased, during such time; and no person holding any office under the United States, shall be a member of either house during his continuance in office.

How does the acceptance of one office vacate another? 62. The acceptance by a member of any office under the United States, after he has been elected to, and taken his seat in congress, operates as a forfeiture of his seat. Van Ness's Case, Cl. & Hall, 122; Yell's Case in 1846-7. Yell had been elected a volunteer colonel in Arkansas, and marched to Mexico. He did not resign; but the governor ordered an election, and Newton was elected, and served out the term. Continuing to execute the duties of an office under the United States, after one is elected to Congress, but before he takes his seat, is not a disqualification, such office being resigned prior to the taking of the seat. Hammond v. Herrick, Cl. & Hall, 287; Earle's Case, Id. 314; Mumford's Case, Id. 316.

25. A person holding two compatible offices or employments under the government is not precluded from receiving the salaries of both. &c. (Converse v. The United States, 21 How. 463.) 9 Op. 508.

What is the effect of holding incompatible offices? 63. "DURING THE TIME FOR WHICH HE WAS ELECTED" does not reach the whole evil. (Rawle on the Const. ch. 19, p. 184; 1 Tucker's Black. App. 375.) Story's Const. 867, 868.

A collector cannot, at the same time, hold the office of inspector of customs and claim compensation therefor. Stewart v. The United States, 17 How. 116.

25. On the acceptance and qualification of a person to a second office, incompatible with the one he is then holding, the first office is *ipso facto* vacated. (The People v. Carrique, 2 Hill, 93.) It operates as an implied resignation; an absolute determination of the original office. (Rex v. Trelawney, 3 Burr, 1616; Millward v. Thatcher, 2 T. R. 87; Wilcock on Municipal Corp. 240, 617; Ang. & Ames on Corp. 255.) Paschal's Annotated Digest, note 200, p. 67; Bien-court v. Parker, 27 Tex. 262.

Where must originate revenue bills?

SEC. VII.—[1.] All bills for raising revenue shall

originate in the house of representatives; but the senate may propose or concur with amendments, as on other bills.

64. This is copied from a rule governing the English Parliament. Story's Const. § 864. The reason is that the commons or members of the house are the immediate representatives of the people. Id. Bills are the forms of enactments before they are acted upon by the house. Those for raising revenue are generally framed upon the estimate of the heads of departments.

What are bills?

65. REVENUE. That which returns or is returned; a rent, *(reditus)*; income; annual profit received from lands or other property. (Cowell). Burrill's Law Dic. REVENUE.

What is revenue?

Here it means what are technically called "money bills." Story's Const. § 874. In practice it is applied to bills to levy taxes in the strict sense of the word. (2 Elliot's Debates, 283, 284). Story's Const. § 880. And see 1 Tucker's Blacks. App. 261.

[2.] Every bill which shall have passed the house of representatives and the senate, shall, before it become a law, be presented to the President of the United States; if he approve, he shall sign it, but if not, he shall return it, with his objections, to that house in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If, after such reconsideration, two-thirds of that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and if approved by two-thirds of that house, it shall become a law. But in all such cases the votes of both houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each house respectively. If any bill shall not be returned by the president within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress by their adjournment prevent its return, in which case it shall not be a law.

What is the manner of passing laws?

165.

What of the veto power?

How overcome?

354.

355.

If the bill be not returned?

When do
bills take
effect?

66. Every bill takes effect as a law, from the time when it is approved by the president, and then its effect is prospective, and not retrospective. The doctrine that, in law, there is no fraction of a day, is a mere legal fiction, and has no application in such a case. In the matter of Richardson, 2 Story, 571; *People v. Campbell*, 1 Cal. 400. But this is denied to be law. In the matter of Welman, 20 Verm. 653; In the matter of Howes, 21 Id. 619. The practice of the presidents has been not to approve bills, not signed by the presiding officers before their actual adjournment.

Can we go
behind the
record?

We cannot go behind the written law. An act of Congress examined and compared by the proper officers, approved by the president and enrolled in the Department of State, cannot afterwards be impugned by evidence to alter and contradict it. 9 Op. 2, 3.

What is the
veto power?

67. This returning of the bill commonly called the "VETO POWER," is simply the *negative power of the president*, which exists in the English Parliament. But the king's veto or negative is a final disposition of the bill. 1 Blacks. Com. 154. The privilege is a part of the king's prerogative never exercised since 1692; 1 Kent's Com. 226-229; De Lolme on Const. ch. 17, p. 390, 391.

Define the
word?

"VETO;" I (FORBID) the word by which the Roman tribunes expressed their negative against the passage of a law or other proceeding, which was also called interceding, (*intercedere*). (Adams' Roman Ant. 13, 145, 146.) Burrill's Law Dic. VETO. And see 1 Wilson's Law Lect. 448, 449; the Federalist, No. 51, 69, 73; Rawle's Const. Ch. 6, p. 61, 62; Burke's letter to the Sheriffs of Bristol in 1777, for the reasons why the exercise has been forborne.

What are its
objects?

It is intended as a defence of the executive authority, and also as an additional security against rash, immature, and improper laws. Idem, and Story's Const. § 881-893.

The veto power was rarely exercised and never overcome during the first forty years of the government. (Story's Const. § 888.)

The most notable instances of its exercise to prevent legislation, which had really not been made issues in the popular contests for the presidency, were the vetos of President Jackson of the renewal of the charter of the United States bank in 1832; and also of his veto of the Maysville Turnpike road. In both these messages the constitutional power of Congress was denied.

In the existing contest of 1840, the recreation of a National bank was one of the favorite issues of the successful party. But Vice-President Tyler, having succeeded to the presidency, after the death of General Harrison, the exercise of the negative power created an obstacle which could not be overcome by a two-thirds vote. Some Internal improvement measures and the French Spoliation appropriations were also defeated by the negatives of President Polk. But the most notable instances of the exercise of the power have been during the administration of President Johnson.

First, in 1866, the defeat of what is called the "Freedmen's Bureau bill," may be classed among the measures incident to history, where the two-thirds majority could not be found to overcome the negative of the executive. But the passage of the "Civil Rights bill" and the several acts for the reconstruction of the rebel states

74, 81.

37.

166.

(found in this volume), are the first instances wherein important measures have been passed by the requisite two-thirds majority. 275-279. And as the president urged the unconstitutionality of the measures, particularly the last, the question of the duty of the executive to see the laws faithfully executed, which he still believes to be unconstitutional, or still to urge his objections after they had been overcome, according to prescribed forms, is for the first time before the judgment of the nation. The very fact that the measures are in regard to States, which the president contends are entitled to representation, may have no small influence upon his judgment. President's Message, Dec., 1861. 46.

68. "TWO THIRDS."—On the 7th July, 1856, the senate of the United States decided, by a vote of thirty-four to seven, that two-thirds of a quorum only were requisite to pass a bill over the president's veto, and not two-thirds of the whole senate. 9 Law Rep. 196. In the ratification of treaties, it is expressly provided that two-thirds of the senators present shall concur. And see Cushing's Law of Legislative Assemblies, § 2387; see Story's Const. § 891; 1 Kent's Com. 249, note *b*. What is a Quorum? 173.

69. The president must receive the bill ten entire days before adjournment, or it will not become a law. *Hyde v. White, 24 Tex. 143, 145; Paschal's Annotated Dig. note 193, p. 62. What of the ten days?

[3.] Every order, resolution, or vote, to which the concurrence of the senate and house of representatives may be necessary (except on a question of adjournment), shall be presented to the President of the United States; and before the same shall take effect, shall be approved by him; or being disapproved by him, shall be repassed by two-thirds of the senate and house of representatives, according to the rules and limitations prescribed in the case of a bill. What shall be presented to the president? 52. 244. Has he the veto? 67.

70. A JOINT RESOLUTION approved by the president, or duly passed without his approval, has all the effect of law. But separate resolutions of either house of congress, except in matters appertaining to their own parliamentary rights, have no legal effect to constrain the action of the president, or of the heads of departments. 6 Opin. 680. Have joint resolutions the effect of law? 46.

The "concurrent resolution" of 1866 in reference to the States in rebellion, not being admitted by either house, was not submitted to the president.

The reason for the exception as to adjournments is, that this is a power peculiarly fitted to be exercised by the two houses in order to secure their independence and prompt action. Story's Const. § 892. Why the exception as to adjournment? 52.

SEC. VIII.—The Congress shall have power—

With what
limitations
is the word
power to be
considered?

14.
41, 48.

138.

142, 144.

268, 269.

1, 148.

71. POWER.—In this connection means authority to enact. It is to be taken in connection, 1, with the general declaration of the first section, that "all legislative POWER herein granted shall be vested in a Congress of the United States;" 2, with the last clause in this section, "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department thereof;" 3, with the inhibitions in the 9th and 10th sections of this article; 4, with the IXth and Xth amendments; 5, with all the necessary powers growing out of other subjects contemplated by the Constitution.

Are the fol-
lowing prop-
erly enumer-
ated powers?

Note p. 28,
30.

269.

P. 365.

Although the powers here following have been called by Mr. Hamilton, Mr. Jefferson, Mr. Madison, and almost by universal custom "*enumerated powers*," and are generally divided by Arabic numbers into eighteen clauses, yet it will be seen by reference to the authentic copy printed from the original, that, like the versification in the Bible, the *enumeration* has been the work of printers. Yet the practice of calling these special powers "*enumerated*" has too long obtained to ever be abandoned. Hamilton: Federalist, No. 83; Jefferson: Opinion on the Bank, 1781; Madison; Veto Message of 1817; Monroe: veto message of 1822; Farrar, § 283–288; Story's Const. § 981.

Were the fol-
lowing spe-
cial powers
actually
enumerated
in the origi-
nal draft of
the constitu-
tion?

The powers specifically granted to Congress are what are called *enumerated powers*, and are numbered in the order in which they stand. (Monroe, 4th May, 1822.) Story's Const. § 981. Certified copies of the Constitution have been printed by Hickey, Curtis, and Farrar, and now by the author, in which the *enumeration* of *articles* and *sections* appear; but there is none for the *clauses*. For convenience the enumeration of clauses is retained in [brackets]. The editor does not partake of the belief that the habit of calling the following powers *enumerated* has been a fruitful source of misconstruction; for without the figures every mind would number them for itself.

What are
the powers
and objects
of taxation?

[2.] To lay and collect taxes, duties, imposts, and excises; to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States.

Define tax-
es?

22, 23.

358.

72. "TAXES."—*Taxare*. In the civil law. To rate or value. Calv. Lex. To lay a tax or tribute. Spellman. In old English practice, to assess; to rate or estimate; to moderate or lay an assessment or rate. Burrill's Law Dic., TAX. A rate or sum of money assessed on the person or property of a citizen, by government, for the use of the nation or State. (Webster.) In a general sense—any contribution imposed by government upon individuals, for the use and service of the State; whether under the name of toll, tribute, tallage, gabel, impost, duty, custom, excise, subsidy, aid, supply, or other name. (Story, Const. § 472; 1 Kent's Com. 254–257. Burrill's Law Dic., TAXES; Tomlin's Law Dic. TAX.)

In a stricter sense—a rate or sum imposed by government upon individuals (or polls), lands, houses, horses, cattle, possessions, and occupations; as distinguished from customs duties, imposts, and excises. (Id.; Webster.) This is the ordinary sense of the word. In New York, the term tax has been held not to include a street assessment. 1 Johns. 77, 80; Sharp v. Spear, 4 Hill, 76; People v. Brooklyn, 4 Comst. 419.) Literally, or according to its derivation—an imposition laid by government upon individuals, according to a certain order and proportion, (*tributum certo ordine constitutum*). (Spelman, voc. TAXA) Id. Distinguished from eminent domain. People v. Brooklyn, 4 Comst. 422-425; s. c. 6 Barb. 214. "Taxes" means burdens, charges, or impositions, put or set upon persons or property for public uses; and this is the definition which the Code gives to tailage. 2 Inst. 522; Carth. 438; Matter of the Mayor, &c. 11 John. 80.

What in a stricter sense?

What literally?

22.

144

73. THE POWER TO LAY AND COLLECT taxes, duties, imposts, and excises, is co-extensive with the territory of the United States. Loughborough v. Blake, 4 Wh. 317.

Over what extent of country?

22, 23.

The power of taxation, as a general rule, is a concurrent power. The qualifications of the rule are the exclusion of the States from the taxation of the means and instruments employed in the exercise of the functions of the federal government. Van Allen v. The Assessors, 3 Wallace, 585.

How far is the power concurrent?

74. The States possess the power to tax the whole of the interest of the shareholder in the shares held by him in the national banks. Van Allen v. The Assessors, 3 Wallace, 588; approved, Bradley v. The People, 4 Wallace, 462. Chief-Justice Chase, in a dissenting opinion for himself and Justices Wayne and Swayne, reviewed McCulloch v. Maryland, 4 Wheat. 327, and Osborn v. the Bank of the United States, 9 Wheat. 73, Weston v. The city of Charleston, 2 Pet. 449, and questioned the power of Congress to authorize State taxation of national securities, either directly or indirectly. Van Allen v. The Assessors, 3 Wallace, 593.

What power have the States to tax?

A city cannot tax United States property within its limits. 9th Op. 291.

What limitation as to the States?

The jurisdiction of the States for the purposes of State taxation is supreme, and Congress can have no power or control in this regard. State Treasurer v. Wright, 28 Ill. 509; Gibbons v. Ogden, 9 Wh. 199.

The State has the right to collect taxes in gold or silver coin only; and Congress cannot control by its legal tender laws. State Treasurer v. Wright, 28 Ill. 509.

82.

The States cannot impose a tax upon the salaries of federal officers. (Dobbins v. The Commissioners of Erie County, 16 Pet. 435.) 9th Op. 477.

97, 99, 155.

75. DUTIES.—Almost equivalent to taxes and perhaps synonymous with the imposts. (Federalist Nos. 30, 36. Madison's letter to Cabell, 18th Sept. 1828; 3 Elliot's Debates, 289.) Story's Const. § 952; Hylton v. The United States, 3 Dall. 171, 177.

What are duties?

72, 76.

76. IMPOSTS.—A custom or tax levied on articles brought into a country. (United States v. Tappan, 11 Wheat. 419. A duty on

Define imposts?

imported goods and merchandise. Story's Const. 952. *Id.* 75.
 Abridgment, § 472. Burrill's Law Dic. IMPOST. In a large sense, 144.
 any tax, duty or imposition. *Id.*

77. EXCISE. An inland imposition upon commodities, charged What are
 in most cases on the manufacturer. 2 Steph. Com. 579. A duty, excises?
 or tax on certain articles produced or consumed at home. 144.
 Wharton's Lex. EXCISE. 1 Bl. Com. 318. It includes also the
 duties on licenses and auction sales. 2 Steph. Com. 581; 3 *Id.*
 314. And see Story's Const. § 953. Andrews Rev. Laws, § 133;
 Burrill's Law Dic. EXCISE. 2 Elliot's Debates, 209. Generally the
 opposite of imposts. Story's Const. § 953.

Licenses under the act of June 30, 1864, "to provide internal What
 revenue to support the government, &c." (13 Stat. 223), and the authority
 amendatory acts, conveyed to the licensee no authority to carry on does a li-
 the licensed business within a State. License Tax Cases, 5 Wal- cense con-
 lace, 462. The requirement of payment for such licenses is only a fer?
 mode of imposing taxes on the licensed business, and the prohibi-
 tion under penalties, against carrying on the business without license
 is only a mode of enforcing the payment of such taxes. The pro-
 visions of the act of Congress requiring such licenses, and
 imposing penalties for not taking out and paying for them, are not
 contrary to the Constitution or to public policy. *Id.*

The provisions in the act of July 13, 1866, "to reduce internal
 taxation, &c." (14 Stat. 93), for the imposing of special taxes, in
 lieu of requiring payment for licenses, removes whatever ambiguity
 existed in the previous laws, and are in harmony with the Consti-
 tution and public policy. *Id.*

The recognition by the acts of Congress of the power and right 73.
 of the States to tax, control, or regulate any business carried on What is the
 within its limits is entirely consistent with an intention on the part power of the
 of Congress to tax such business for national purposes. States?

A license from the Federal Government, under the internal reve-
 nue acts of Congress, is no bar to an indictment under a State law 267.
 prohibiting the sale of intoxicating liquors. The *License Tax*
Cases, 5 Wallace, 462; *Pervear v. Commonwealth*; 5 Wallace, 475.

But very different considerations apply to the internal commerce What are
 or domestic trade of the States. Over this commerce and trade the exclu-
 Congress has no power of regulation nor any direct control. This sive rights of
 power belongs exclusively to the States. No interference by Con- the States?
 gress with the business of citizens transacted within a State is
 warranted by the Constitution, except such as is strictly incidental
 to the exercise of powers clearly granted to the legislature. *Per-*
vear v. Commonwealth, 470, 471.

The provisions in the act of July 13, 1866, "to reduce internal
 taxation, &c." (14 Stat. 93), for the imposing of special taxes, in
 lieu of requiring payment for licenses, removes whatever ambiguity
 existed in the previous laws, and are in harmony with the consti-
 tution and public policy. *Id.*

The recognition by the acts of Congress of the power and right
 of the States to tax, control, or regulate any business carried on
 within its limits is entirely consistent with an intention on the part
 of Congress to tax such business for National purposes.

A license from the Federal Government, under the internal revenue acts of Congress, is no bar to an indictment under a State law prohibiting the sale of intoxicating liquors. (The License Tax Cases, 5 Wallace, 462 affirmed.) *Pervear v. The Commonwealth*, 5 Wallace, 475. 267.

A law of a State taxing or prohibiting a business already taxed by Congress, as *ex. gr.*, the keeping and sale of intoxicating liquors,—Congress having declared that its imposition of a tax should not be taken to abridge the power of the State to tax or prohibit the licensed business—is not unconstitutional. *Id.* Of prohibitory laws?

78. "TO PAY THE DEBTS." The arrangement and phraseology (connected with what follows) shows that the latter part of the clause ("To provide for the common defence and general welfare,") was intended to enumerate the purposes for which the money thus raised was intended to be appropriated. (President Monroe's Message of 4th Dec. 1822.) *Story's Const.* § 978-981. What means to pay the debts? 79, 80. 74-77.

This power to collect taxes, imposts, and excises, subjects to the call of Congress every branch of the public revenue, internal and external. (Monroe, *Id.*) *Story's Const.* § 981. And these powers give the right of appropriating to the purposes specified, according to the proper construction of the terms. *Id.* 360.

Statement of the public debt on the 1st day of January in each of the years from 1791 to 1842, inclusive, and at various dates in subsequent years to July 1, 1866. Examine the statement of the public debt?

On the 1st day of January....	1791.....	\$ 75,463,476 52
	1792.....	77,227,924 66
	1793.....	80,352,634 04
	1794.....	78,427,404 77
	1795.....	80,747,587 38
	1796.....	83,762,172 07
	1797.....	82,064,479 33
	1798.....	79,228,529 12
	1799.....	78,408,669 77
	1800.....	82,976,294 35
	1801.....	83,038,050 80
	1802.....	80,712,632 25
	1803.....	77,054,686 30
	1804.....	86,427,120 88
	1805.....	82,312,150 50
	1806....	5,723,270 66
	1807.....	69,218,398 64
	1808.....	65,196,317 97
	1809.....	57,023,192 09
	1810.....	53,173,217 52
	1811.....	48,005,587 76
	1812.....	45,209,737 90
	1813.....	55,962,827 57
	1814.....	81,487,846 24
	1815.....	99,833,660 15
	1816.....	127,334,933 74
	1817.....	123,491,965 16

On the 1st day of January....	1818.....	103,466,633 83
	1819.....	95,529,648 28
	1820.....	91,015,566 15
	1821.....	89,987,427 66
	1822.....	93,546,676 98
	1823.....	90,875,877 28
	1824.....	90,269,777 77
	1825.....	83,788,432 71
	1826.....	81,054,059 99
	1827.....	73,987,357 20
	1828.....	67,475,043 87
	1829.....	58,421,413 67
	1830.....	48,565,406 50
	1831.....	39,123,191 68
	1832.....	24,322,235 18
	1833.....	7,001,032 88
	1834.....	4,760,081 08
	1835.....	351,289 05
	1836.....	291,089 05
	1837.....	1,878,223 55
	1838.....	4,857,660 46
	1839.....	11,983,737 53
	1840.....	5,125,077 63
On the first day of January,...	1841.....	6,737,398 00
	1842.....	15,028,486 37
	1843.....	27,203,450 69
On the first day of July	1844.....	24,748,188 23
	1845.....	17,093,794 80
	1846.....	16,750,926 33
	1847.....	38,956,623 38
	1848.....	48,526,379 37
	1849.....	64,704,693 71
On the 1st day of December ..	1850.....	64,228,238 37
	1851.....	62,560,395 26
On the 20th day of November	1852.....	65,131,692 13
On the 30th day of December	1853.....	67,340,628 78
On the first day of July	1854.....	47,242,206 05
	1855.....	39,969,731 05
On the 17th day of November	1856.....	30,963,909 64
On the 15th day of November	1857.....	29,060,386 90
On the 1st day of July.....	1858.....	44,910,777 66
	1859.....	58,754,699,33
	1860.....	64,769,703 08
	1861.....	90,867,828 68
	1862.....	514,211,371 92
On the 1st day of January....	1863.....	1,098,793,181 37
	1864.....	1,740,690,489 49
	1865.....	2,682,593,026 53
	1866.....	2,783,425,879 21

S. B. COLBY, *Register*.

TREASURY DEPARTMENT,

• *Register's Office, November 22, 1866.*

Report of Secretary of Treasury on the Finances, p. 304.

The following is a statement of the public debt, June 30, 1866, exclusive of cash in the Treasury :—

Bonds, 10-40's, 5 per cent., due in 1904.....	\$171,219,100 00	
Bonds, Pacific railroad, 6 per cent., due in 1895 and 1896...	6,042,000 00	
Bonds, 5-20's, 6 per cent., due in 1882, 1884, and 1885.....	722,205,500 00	
Bonds, 6 per cent., due in 1881..	265,317,700 00	
Bonds, 6 per cent., due in 1880..	18,415,000 00	
Bonds, 5 per cent., due in 1784	20,000,000 00	
Bonds, 5 per cent., due in 1871.	7,022,000 00	
	<hr/>	\$1,210,221,300 00
Bonds, 6 per cent., due in 1868..	8,908,341 80	
Bonds, 6 per cent., due in 1867..	9,415,250 20	
Compound-interest notes, due in 1867 and 1868.....	159,012,140 00	
7-30 treasury notes, due in 1867 and 1868.....	806,251,550 00	
	<hr/>	983,587,282 00
Bonds, Texas indemnity, past due; not presented	559,000 00	
Bonds, treasury notes, &c., past due, not presented.....	3,815,675 80	
	<hr/>	4,374,675 80
Temporary loan, ten days' notice	120,176,196 65	
Certificates of indebtedness, past due, not presented.....	26,391,000 00	
	<hr/>	146,567,196 65
United States notes.....	400,891,368 00	
Fractional currency.....	27,070,876 96	
Gold certificates of deposit....	10,713,180 00	
	<hr/>	438,675,424 96
Total.....		<hr/> 2,783,425,879 41

The foregoing is a correct statement of the public debt, as appears from the books and Treasurer's returns in the Department, on the 1st of November, 1867.

THE PUBLIC DEBT STATEMENT.

WASHINGTON, Nov. 6, 1867, }
11:30 o'clock, P. M. }

The following is the statement of the public debt of the United States on the 1st of November, 1867:—

DEBT BEARING COIN INTEREST.

Five per cent. bonds...	\$ 198,845,350
Six per cent. bonds of 1857 and 1868.....	14,690 940
Six per cent. bonds of 1881.....	283,676,600
Six per cent. five-twenty bonds.....	1,267,898,100
Navy Pension fund.....	13,000,001
	<hr/>
Total.....	\$1,778,110,991

DEBT BEARING CURRENCY INTEREST.

Six per cent. bonds.....	\$ 18,042,000
Three-year compound-interest notes.....	62,558,940
Three-year seven-thirty notes.....	334,607,700
Three per cent. certificates.....	11,560,000
Total.....	\$426,768,640

MATURED DEBT NOT PRESENTED FOR PAYMENT.

Three-year seven-thirty notes, due August 15, 1867	\$ 3,371,100
Compound-interest notes, matured June 10, July 15, August 15, and Oct. 15, 1867.....	9,316,100
Bonds of Texas indemnity.....	262,000
Treasury notes, acts July 17, 1861, and prior thereto	163,661
Bonds, April 15, 1842.....	54,061
Treasury notes, March 3, 1863.....	868,240
Temporary loan.....	4,168,375
Certificates of indebtedness.....	34,000
Total.....	\$ 18,237,538

DEBT BEARING NO INTEREST.

United States Notes.....	\$ 357,164,844
Fractional Currency.....	30,706,433
Gold certificates of deposit.....	14,514,200
Total.....	\$ 402,385,677
Total debt.....	\$ 2,625,502,848

AMOUNT IN THE TREASURY.

In coin.....	\$ 111,540,317
In currency.....	22,458,080
Total.....	\$ 133,998,398
Amount of debt, less cash in the Treasury.....	\$ 2,491,504,450

HUGH McCULLOCH,
Secretary of the Treasury.

Report of the Secretary of the Treasury on the finances, p. 25.

There has been some diminution of the public debt since the promulgation of this report.

Whatever may have been the theories and controversies about the powers of Congress to levy taxes for other purposes than to pay the debts of the United States, and as to whether indirect or direct taxes are most equal and just, it is certain that the enormous debt now existing, together with the necessarily increased expenses of supporting the government, will afford a fair opportunity of giving a trial to every mode of raising revenue. The DEBTS have been contracted. The great future question is, how shall the power to levy TAXES, &c., be *most* wisely exercised in order to pay them?

79. TO PROVIDE FOR THE COMMON DEFENCE.—See this sentence contained in connection with the conclusion, that all duties, imposts, and excises shall be uniform throughout the United States. This provision operates exclusively on the power granted in the first part of the clause. (Monroe.) Story's Const., § 982. How is common defence construed? 10, 78.

The object is to secure a just equality among the States in the exercise of that power by Congress. (Monroe.) Id., § 982.

The grant consists of two-fold power: to raise; and to appropriate the money. (Monroe.) Id., § 986. What two powers in the grant?

The power in this clause is limited by the nature of the government only. Id., and § 991.

For a more limited doctrine, see President Jackson's veto message of the Maysville road bill, 27 May, 1830; 4 Elliot's Debates, 333-335; 4 Jefferson's Correspondence, 524; Jefferson's message, 72-77. 2d Dec., 1806; Wait's State papers, 457, 458.

The extent of the power has been very much debated, and perhaps the subject was exhausted in Congress, as reported in 4th Elliot's Debates, 236, 240, 265, 278, 280, 284, 291, 292, 332, 334, and in Hemphill's Report on Internal Improvements, 10th Feb., 1831; see also 1 Kent's Com., Lect. XII, 250, 251; Sergt's Const., ch. 28, 311-314; Rawle on the Const., ch. 9, p. 104; 2 United States Law Jour., April, 1826, p. 251, 264-280; Story's Const., ch. xiv. 80.

Every one will determine for himself the practice of the government from the appropriations for the Cumberland road in 1806, down to the Pacific railroads, and judge the value of precedents, according to his own theories. The speeches of Mr. Huger and Grimke in the South Carolina legislature, in 1830, may well be consulted by students. The term is necessarily connected with the next, "the general welfare."

The Confederate States Constitution contained this limitation:—

"To levy and collect taxes, duties, imposts, and excises, for revenue necessary to pay the debts, provide for the common defence, and carry on the government of the Confederate States; but no bounties shall be granted from the treasury, nor shall any duties or taxes on importations from foreign nations be laid to promote or foster any branch of industry; and all duties, imposts, and excises shall be uniform throughout the Confederate States." Paschal's Annotated Dig., 88. What was the Confederate States (rebel) Constitution?

It will thus be seen that, as in the preamble of the Constitution 5, 11. of this peculiarly indoctrinated school, they took "TO PROVIDE FOR THE GENERAL WELFARE" out of their Constitution; while they left the "COMMON DEFENCE" in, although it was not one of the objects expressed in the preamble.

To leave no doubt of the intention to exclude the ideas which had divided the country upon the subject of internal improvements, the same Constitution contained this clause:— 80-89.

"3. To regulate commerce with foreign nations, and among the several States, and with the Indian tribes; but neither this nor any other clause contained in the Constitution, shall ever be con-

Internal im- strued to delegate the power to Congress to appropriate money for
provements. any internal improvement, intended to facilitate commerce, except
for the purpose of furnishing lights, beacons, and buoys, and other
aids to navigation upon the coasts, and the improvement of harbors
and the removing of obstructions in river navigation: in all which
cases such duties shall be laid on the navigation facilitated thereby,
as may be necessary, to pay the costs and expenses thereof." *Paschal's Annotated Digest*, p. 88.

The object of this was to prevent land internal improvements by
the National government; and yet we find the same men as early
as April 19th, 1862, appropriating a million and a half of dollars
to aid in the construction of a railroad from New Iberia in Louisi-
ana to Houston in Texas. *Acts of Confederate States at large*, 34.
Like appropriations were made to complete the road from Danville
to Raleigh. The amendment was in accordance with the extreme
States rights or strict constructionists' views.

Define the
general
welfare.

80. "AND GENERAL WELFARE." Judge Story believed that the
true import of the whole clause could be thus expressed: "The
Congress shall have power to lay and collect taxes, duties, imposts,
and excises, *in order* to pay the debts, and to provide for the common
defence and general welfare of the United States." *Story's Const.*
§ 908. Thus limiting the power of the government to tax for pro-
viding for the common defence and general welfare. *Id.* and
§ 911-913.

11, 79, 89.
79.

What is the
power and
the purpose?

The laying taxes is the *power*, and the general welfare the *pur-
pose* for which the power is to be exercised. Congress are not to
lay taxes *ad libitum* for any purpose they please; but only to pay
the debts or provide for the general welfare of the Union. In like
manner they are not to do any thing they please, to provide for the
general welfare; but only to lay taxes for that purpose. (*Jefferson's Op.* on the Bank of the United States 15 Feb. 1781; 4 *Jefferson's Correspondence* 524, 525.) *Story's Const.* § 926, 927, note 3; *Elliot's Debates*, 170, 183, 195, 328, 344; 3 *Elliot's Debates*, 262; 2 *American Museum*, 434; 2 *Elliot's Debates*, 81, 82, 311; 3 *Elliot's Debates*, 262, 290; 2 *American Museum*, 544.

22, 74.

The power does not interfere with the power of the states to tax
for the support of their own governments. Congress is not em-
powered to tax for those purposes which are within the exclusive
province of the States. *Gibbons v. Ogden*, 9 Wheat. 199; 1
Kent's Com. 251; *Sergeant's Const. Ch.* 28, p. 311-315. *Rawle's*
Const. Ch. 9, p. 104; 2 *United States L. I.*, April, 1826, 251-282.

What are the
rules for
taxes?

81. "ALL DUTIES TO BE UNIFORM." Congress has plenary power
over every species of taxable property, except exports. But there
are two rules prescribed for their government:—Uniformity, and
apportionment. Duties, imposts and excises were to be laid by the
first rule; and capitation and other direct taxes by the second.
(*Hylton v. The United States*, 3 Dall. 171.) 1 *Kent's Com.* 255.

22, 144, 145.

Define uni-
form?

Taxes under this clause must be uniform; but need not be
apportioned according to census. *Idem.* Yet "UNIFORM" must
mean that the same duties shall be paid at all the ports in the
"States and Territories," throughout the United States; and that

the same income taxes and excises should operate, alike including the District of Columbia. *Loughborough v. Blake*, 5 Wheat. 317. 91.

The Indian tribes are not included in the excise law. 91, 92.

See "*uniform*" rule of naturalization. 93, 94.

[2.] To borrow money on the credit of the United States. To borrow.

82. As first reported it read: "To borrow money [and emit bills] on the credit of the United States." To "emit bills," was stricken out, after debate, on the ground, that "*on the credit*," authorized the issuing of bills or notes by the government. *Metropolitan Bank v. Van Dyke*, 27 N. Y. R. 420; 3 Madison papers, 1343. 129. 78. 361.

83. MONEY.—[*Moneta*.] Cash; that is, gold and silver, or the lawful circulating medium of the country, including bank notes, when they are known and approved of and used in the market as cash. (Co. Litt. 207 a; Lord Ellenborough, 13 East 20; Kent. in *Mann v. Mann*, 1 Johns. Ch. R. 236.) Burrill's Law Dic. **MONEY.** And money deposited in bank; but not stocks. *Hotham v. Sutton*, 15 Ves. 319; *Mann v. Mann*, 1 Johns. Ch. p. 257. What is money? 97, 98, 129. 371.

For the necessity of this power, see the Federalist No. 41; Story's Const. § 1065.

Treasury notes have been issued under the acts of 25th Feb. 1813, 26th December, 1814, 12th October, 1837, 31 January, 1842, 31 August 1842, 22 July, 1846, 28 July, 1847, 23 December, 1857, the 25th February, 1862, and the several subsequent acts. They are binding on the government. (*Thorndyke v. The United States*, 2 Mason, 1, 18.) *Metropolitan Bank v. Van Dyck*, 27 New York, 421. Some have drawn interest; others not; they all circulate as money. And see the Pennsylvania Cases. 52 Penn. St. Rep. 15-100. Treasury notes on what authority issued? 78. 22. 362.

84. The United States bonds and indeed all the public securities which have to be redeemed, and which circulate as currency may properly be classified as *money* borrowed, or rather securities given for money borrowed on the credit of the United States. The bonds issued and sold in market are technically so. 78. 22. 362.

The states have no power to tax the loan of the United States. *Weston v. City Council of Charleston*, 2 Pet. 449-65; *Bank of Commerce v. New York*, 2 Black, 629. The Constitutional Court of South Carolina, in May, 1823, decided in favor of the power to tax the loan. Judge Huger and two other judges, against four, gave an opinion against the constitutionality of the law. 2 Pet. 452. Can the States tax the public securities? 22.

The sovereignty of a state extends to every thing which exists by its own authority, or is introduced by its permission, but not to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States. (*Weston v. The City of Charleston*, 2 Pet. 449.) *Bank of Commerce v. New York*, 2 Black, 632.

This power is supreme within its scope and operation, and may be exercised free and unobstructed by state legislation or authority.

(*McCulloch v. The State of Maryland*, 4 Wh. 116; *Osborn v. The United States*, 9 Wh. 732,) *Bank of Commerce v. New York City*, 2 Black. 632.

Are treasury notes a constitutional legal tender? For the history of this section, see *Metropolitan Bank v. Van Dyck*, 27 N. Y. Rep. 419, *et seq.* The power to issue notes is thus given, and the convention declined to prohibit the making them a legal tender in payment of either public or private debts. (*Thorn-dyke v. United States*, 2 Mas. 1, 18). *Id.* And after a full review of the question of power, it was held that such notes may constitutionally be made a legal tender in payment of all debts between individuals. *Metropolitan Bank v. Van Dyck*, 27 N. Y. 451.

82, 83.

97-100.

Congress has constitutional power to issue treasury notes of the United States, and make them lawful money, and a legal tender for the payment of debts. *Shollenberger v. Brinton*, 52 Penn. St. Rep. (2 P. F. Smith) 9,100; *Brown v. Welch*, 26 Ind. 116; *Thayer v. Hedges*, 23 Ind. 141; *Bank of Indiana v. Reynolds*, Law Reg. 1865. (But *Contra*, Judge Cadwalader. *Morrison v. Reading Railroad*.) *Shollenberger v. Brinton*, 52 Penn. 49.

The Act of Congress of Feb. 25, 1862, authorizing the issue of such notes, is constitutional. *Shollenberger v. Brinton*, 52 Penn. St. Rep. (2 P. F. Smith) 9,100; *Carpenter v. Northfield Bank*, 39 Vt. (4 Veasey) 49.

Give the ex-amples? The principal sum which redeems a ground-rent, is a "debt" within the meaning of the act. *Shollenberger v. Brinton*, 52, Penn, 9, 100.

A ground-rent payable in "*** dollars, lawful *silver money* of the United States of America," is redeemable by such notes. *Id.*

155.

So the half-yearly instalment of a ground-rent, payable in "*** dollars lawful silver money of the United States, each dollar weighing 16 dwt. 6 gr. *at least*." *Mervin v. Sailor*, 52 Penn. St. Rep. (2 P. F. Smith), 18, 45, 102.

So a ground-rent payable in "lawful money," or "lawful money of the United States." *Davis v. Burton*, 52 Penn. St. Rep. (2 P. F. Smith) 22; *Kroener v. Calhoun*, 52 Penn. St. Rep. (2 P. F. Smith) 24.

So a certificate of deposit of "*** gold, payable in like funds with interest." *Sandford v. Hays*, 52 Penn. St. Rep. (2 P. F. Smith) 26; *Warner v. Sauk Co. Bank*, 20 Wis. 494; *Warnibold v. Schlieting*, 16 Iowa, 243; *Breitenbach v. Turner*, 18 Wis. 140.

So a note for a sum of money marked in margin, "\$14,145 specie," which by banker's rules, meant gold or silver coin. *Graham v. Marshall*, 52 Penn. St. Rep. (2 P. Smith) 28, 103

So a note for "*** dollars in gold," *Laughlin v. Harvey*, 52 Penn. St. Rep. (2. P. F. Smith) 30; *Wood v. Bullens*, 6 Allen (Mass.) 516, 518.

So, "or if paid in paper, the amount thereof necessary to purchase the gold, at the place of payment." (*Logansport v. Indiana*.) *Brown v. Welch*, 26 Ind. 116.

The condition of a bond for payment of \$3,000 "in good coins of United States, of a particular fineness, notwithstanding any laws which may now, or hereafter shall make any thing else a tender in

payment of debt. *Held*, not payable in greenbacks. *Dutton v. Pailant*, 52 Penn. St. Rep. (2 P. F. Smith) 109.

"When treasury notes were made a legal tender in payment of debts, they were made the equivalent of coin as a means of payment, in all but the cases excepted by law." *Brown v. Welch*, 26 Ind. 117. 99.

The outstanding debt of the United States for borrowed money usually called the loan, see note 78. 78.

[3.] To regulate commerce with foreign nations, and among the several States, and with the Indian tribes. What is the power as to commerce?

85. "TO REGULATE." That is, to prescribe the rule by which commerce is to be governed. (*Gibbons v. Ogden*, 9 Wheat. 196.) Story's Const. § 1061. How to regulate commerce? 101.

The power is exclusive, and leaves no residuum. (*Gibbons v. Ogden*, 9 Wheat. 209.) Story's Const. § 1072. See the Passenger Cases, 7 How. 283. 101.

But a State may pass police laws for the protection of its inhabitants against paupers. This is not a regulation of commerce. The city of New York v. Miller, 12 Pet. 102, 132; Story's Const. § 1072 a. 363.

It is denied that the power "to REGULATE" is exclusively in Congress. (The License Cases, 5 How. 504.) Id. § 1072. And license laws, the primary object of which is to secure the health of the community. The License Cases, 5 How. 504; Story's Const. § 1072. 89.

86. "COMMERCE" is traffic, but it is something more; it is intercourse. (*Gibbons v. Ogden*, 9 Wheat. 191, 209.) United States v. Holliday, 3 Wallace, 417; Story's Const. § 1061, note 2. What is commerce? 209.

Buying, selling, and exchanging is the essence of commerce. 3 Wall, 417. It also includes navigation, as well as traffic, in its ordinary signification; and embraces ships and vessels as the instruments of intercourse and trade, as well as the officers and seamen who navigate and control them. The power of Congress extends to all these subjects. *People v. Brooks*, 4 Denio, 469.

For the necessity of this power see the Federalist, Nos. 4, 7, 11, 22, 37; *Gibbons v. Ogden*, 9 Wheat. 225; *Brown v. Maryland*, 12 Wheat. 445, 446; Story's Const. §§ 1057, 1060.

To regulate the external commerce of the nation and the respective states. *People v. Huntington*, 4 N. Y. Leg. Obs. 187. The whole subject fully discussed. Id. But not to declare the status which any person shall sustain while in any State of the Union. The power can be exercised over persons as passengers, only while on the ocean, and until they come under State jurisdiction. It ceases when the voyage ends, and then the State laws control. *Lemmon v. People*, 26 Barb. 270; affirmed, 20 N. Y. 562. Can Congress declare the status of persons in the States? 18, 196.

87. "COMMERCE WITH FOREIGN NATIONS" means commerce between citizens of the United States and citizens or subjects of foreign governments, as individuals. United States v. Holliday, 3 Wallace, 417; *Flannagan v. Philadelphia*, 22 Penn. 219. The erection of wharves is subservient to commerce. *Stevens v. Walker*, 15 La. Ann. 577. With foreign nations. 231.

365.

The giving of a license by a municipal corporation is not a regulation of commerce. *Childers v. People*, 11 Mich. 43.

The violation of a local law requiring such licenses, by the use of an unlicensed boat, though it be duly licensed for the coasting and foreign trade under the laws of the United States, is a punishable offense. *Id.*

A tax, the effect of which is to diminish personal intercourse, is a tax upon commerce. *Linsing v. Washburn*, 30 Cal. 534. The California tax-law upon Chinese is a violation of this section and unconstitutional. *Id.*

With foreign
nations and
among the
several
States?

This power, like all others vested in Congress, is complete in itself may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. *Gibbons v. Ogden*, 9 Wh. 196. Commerce with foreign nations, and among the several States, can mean nothing more than intercourse with those nations, and among those States, for the purposes of trade, be the object of trade what it may; and this intercourse must include all the means by which it can be carried on, whether by the free navigation of the waters of the several States, or by a passage over land through the States, where such passage becomes necessary to the commercial intercourse between the States. *Corfield v. Coryell*, 4 Wash. C. C. 388; *Pennsylvania v. Wheeling & Belmont Bridge Co.* 18 How. 421; *Columbus Ins. Co. v. Peoria Bridge Co.* 6 McLean, 70; *Columbus Insurance Co. v. Curtenius*, *Id.* 209; *Jolly v. Terre Haute Drawbridge Co.* *Id.* 237; *United States v. Railroad Bridge Co.* *Id.* 518. This clause confers the power to impose embargoes. *Gibbons v. Ogden*, 9 Wh. 191; *United States v. The William*, 2 Hall's L. J. 255, 272. And to punish crimes upon stranded vessels. *United States v. Coombs*, 12 Pet. 72. It does not, however, interfere with the right of the several States to enact inspection, quarantine, and health laws of every description, as well as laws for regulating their internal commerce. *Gibbons v. Ogden*, 9 Wh. 203; *New York v. Miln*, 11 Pet. 102; *Conway v. Taylor*, 1 Black. 633. Nor with their power to regulate pilots. *Cooley v. Board of Wardens*, 12 How. 299. Or to protect their fisheries. *Smith v. Maryland*, 18 How. 71; *Dunham v. Lamphere*, 3 Conn. 268.

State laws
which vio-
late?

79.

§8. A State law which requires the masters of vessels engaged in foreign commerce to pay a certain sum to a State officer, on account of every passenger brought from a foreign country into the State, or before landing any alien passenger in the State, conflicts with the Constitution and laws of the United States. *Smith v. Turner*, 7 How. 263. (This decision was by a divided court, and is not conclusive authority. *Smith v. Marston*, 5 Tex. 432.) So does a state law, authorizing the seizure and imprisonment of free negroes brought into any port of the state, on board of any vessel, from any state or foreign port. *Elkison v. Dellesseline*, 2 Wh. Cr. Cas. 56; 1 Opin. 659. (But see 2 Opin. 426, *contra.*) And so does a state law which requires an importer to take a license, and pay fifty dollars before he should be permitted to sell a package of imported goods. *Brown v. Maryland*, 12 Wh. 419. *Purveyar v. Commonwealth*, 5 Wall. 478. But a State law which imposes a tax on brokers dealing in foreign exchange, is not repugnant to this clause

of the Constitution. *Nathan v. Louisiana*, 8 How. 73. Nor is one imposing a tax on legacies payable to aliens. *Mager v. Grima*, Id. 490. Nor are the license laws of certain States, forbidding the sale of spirituous liquors under less than certain large quantities. *Thurlow v. Massachusetts*, 5 How. 504; *The State v. Allmond*, 4 Am. D. R. 533; *California v. Coleman*, 4 Cal. 467.

89. "AMONG THE SEVERAL STATES. This section quoted with clause 18, and Art. VI., Sec. 2, and Art. X. of Amendments. *Gilman v. Philadelphia*, 3 Wallace, 724. What is commerce among the several States?

Commerce includes navigation; and comprehends the control for that purpose, and to the extent necessary, of all navigable waters of the United States which are accessible from a State other than those within which they lie. For this purpose they are the public property of the nation, and subject to all the requisite legislation of Congress. (*Gibbons v. Ogden*, 9 Wheat. 191; *Corfield v. Coryel*, 4 Wash. C. C. R. 378.) *Gilman v. Philadelphia*, 3 Wallace, 724, 725. 183, 114, 274, 203, 86, 87.

The right includes the power to remove all obstructions, and to provide for the punishment of offenders. The whole powers which existed in the States before the adoption of the Federal Constitution, and which have always existed in the Parliament in England. Id. What does the right include? 203.

It is for Congress to determine when its full powers shall be brought into activity, and as to the regulations and sanctions which shall be provided. (*United States v. New Bedford Bridge*, 1 Woodbury & Minot, 420, 421; *United States v. Coombs*, 12 Peters. 72; *New York v. Milne*, 11 Peters, 102, 155.) *Gilman v. Philadelphia*, 3 Wallace, 725.

Wherever "commerce among the States" goes, the power of the nation, as represented in this Court, goes with it to protect and enforce its rights. (*Gibbons v. Ogden*, 9 Wheat. 191; *Steamboat v. Livingston*, 3 Cowen. 713.) *Gilman v. Philadelphia*, 3 Wallace, 725. What is the power of the Supreme Court to enforce the right?

The National Government possesses no powers but such as have been delegated to it by the States, which retain all but such as they have surrendered. The power to authorize the building of a bridge is not to be found in the Federal Constitution. It has not been taken from the States. Id. When the Revolution took place the people of each State became themselves sovereign, and in that character hold the absolute right to all their navigable waters and the soil under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government. (*Martin v. Waddell*, 16 Peters, 410.) *Gilman v. Philadelphia*, 3 Wallace, 726. *Ante* Preface, pp. viii., ix. The right of eminent domain over the shores and the soil under the navigable waters, for all municipal purposes, *belongs exclusively to the States within their territorial jurisdiction*, and they only have the power to exercise it. Id. What are the powers of the United States? 71, 183, 269. 2, 6. Eminent domain?

But this right can never be used to affect the exercise of any national right of eminent domain or jurisdiction with which the United States have been invested by the Constitution. (*Pollard's lessee v. Hogan*, 3 Howard, 230.) *Gilman v. Philadelphia*, 3 Wallace, 726. Can the States use a national right?

What subjects are under State control? Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turn-pike roads, ferries, &c., are component parts of the powers of a State. (*Gibbons v. Ogden*, 9 Wheat. 192) *Gilman v. Philadelphia*, 3 Wallace, 726. And also bridges. (*People v. S. & R. R. Co.*, 15 Wend. 113.) *Id.*

Pilot laws? Pilot laws enacted in good faith are within the powers of the States. (*Cooly v. The Board of Wardens*, 12 Howard, 319.) *Gilman v. Philadelphia*, 3 Wallace, 727. *Master v. Ward*, 14 La. A. 289; *Master v. Morgan*, 14 Ib. 595.

When is a law of Congress paramount? But where Congress has acted the law is paramount. (*Pennsylvania v. Virginia*, 18 Howard, 430.) *Gilman v. Philadelphia*, 3 Wallace, 727, 729. Until Congress has exercised the power, the State may authorize obstructions which do not violate the Constitution. (*Wilson v. Blackbird Creek Marsh Co.* 2 Peters, 250.) *Id.* 727-729.

When may the States exercise concurrent powers? The States may exercise concurrent or independent power in all cases but three: 1. Where the power is lodged exclusively in the Federal Constitution. 2. Where it is given to the United States and prohibited to the States. 3. Where from the nature and subjects of the power, it must be necessarily exercised by the National Government exclusively. (*Houston v. Moore*, 12 Wheat. 419; *Federalist No. 32.*) *Gilman v. Philadelphia*, 3 Wallace, 730.

What laws of a State are void? A State law requiring an importer to take out a license before he shall sell a bale of goods is void. (*Brown v. Maryland*, 12 Wheat. 419.) *Gilman v. Philadelphia*, 3 Wallace, 730. *Purvear v. Commonwealth*, 5 Wall. 478. So the passenger laws from foreign countries. (*Passenger's Cases*, 7 Howard, 273.) *Gilman v. Philadelphia*, 3 Wall. 730. Not so of the State liquor-license laws. (*License cases*, 5 Howard, 504.) *Gilman v. Philadelphia*, 3 Wallace 730. *Purvear v. Commonwealth*, 5 Wall. 498. Congress may

Bridges? regulate all bridges over navigable waters, remove offending bridges, and punish those who shall thereafter erect them. *Id.* 731.

Where does power of Congress not stop? The power to regulate commerce does not stop at the jurisdiction or limits of the several States. (*Gibbons v. Ogden*, 9 Wheat. 190.) *United States v. Holliday*, 3 Wallace, 417.

What were the powers as to slaves? **90.** As to the power of Congress over the subject of commerce among the several States, see the Opinion of McLean, J., in *Groves v. Slaughter*, 15 Pet. 504; Taney, Ch. J., *Id.* 508; Baldwin, J., *Id.* 510. In *Shelton v. Marshall*, 16 Tex. 352, Wheeler, J., said:—As respects the power of the States over the subject of the Constitutional inhibitions in question (the introduction of slaves as merchandise), what we deem the sound and correct doctrine was stated by Chief-Justice Taney, in *Groves v. Slaughter*, 15 Pet. 508, viz.:—

"In my judgment, the power over this subject is exclusively with the several States: and each of them has a right to decide for itself, whether it will or will not allow persons of this description to be brought within its limits, from another State, either for sale or for any other purpose; and also to prescribe the manner and mode in which they may be introduced, and to determine their condition and treatment within their respective territories; and the action of the several States upon this subject cannot be controlled by Con-

gress, either by virtue of its power to regulate commerce, or by virtue of any other power conferred by the Constitution of the United States."

Congress may have power to prevent the obstruction of any Navigable stream which is a means of commerce between any two streams?
or more States. *Works v. Junction Railroad*, 5 McLean, 526; *Jolly v. Terre Haute Drawbridge Co.* 6 Id. 237; *Devoe v. Penrose Ferry Bridge Co.* 3 Am. L. J. 79. But a State law granting the exclusive privilege of navigating a part of an unnavigable stream, which is wholly within the State, on condition of rendering such part navigable, is not repugnant to the Constitution. *Veazie v. Moore*, 14 How. 568; *Wilson v. Blackbird Creek Marsh Co.* 2 Pet. 251. 203.

91. "WITH THE INDIAN TRIBES."—If traffic or intercourse be carried on with an Indian tribe, or with a member of such tribe, it is subject to be regulated by Congress, although within the limits of a State. The power is absolute, without reference to the locality of the tribe or the member of the tribe. *United States v. Holliday* 3 Wallace, 418. This power is not claimed as to any other commerce originated and ended within the limits of a single State. *Id.* So long as the tribal relations exist, the Indians who are connected with their tribes and under the jurisdiction of an agent, are under the protection of the laws to regulate trade and intercourse with the Indians. *Id.* The States cannot control the subject. *Id.* With the Indian tribes? Does the locality of the tribe cause a difference?

Under the power to regulate commerce with the Indian tribes, Congress has power to prohibit all intercourse with them, except under a license. *United States v. Cisna*, 1 McLean, 254. So Congress has power to punish all crimes committed within the Indian country, which was a part of the Louisiana territory, dedicated to the Indians. *The United States v. Rogers*, 4 How. 567.

The United States has adopted the principle originally established by European nations, namely, that the aboriginal tribes of Indians in North America are not regarded as the owners of the territories which they respectively occupied. Their country was divided and parceled out, as if it had been vacant and unoccupied land. *Id.* If the propriety of exercising this power were now an open question, it would be one for the law-making and political department of the government, and not the judicial. *Id.* What is the rule as to ownership of soil?

The Indian tribes residing within the territorial limits of the United States, are subject to their authority; and where the country occupied by them is not within the limits of any one of the States, Congress may by law, punish any offence committed there, no matter whether the offender be a white man or an Indian. *Id.*; *The United States v. Rogers*, 4 How. 567. 196.

The 25th section of the act of 30th June, 1834, extends the laws of the United States over the Indian country, with a proviso that they shall not include punishment for "crimes committed by one Indian against the person or property of another Indian." *Id.* This exception does not embrace the case of a white man who, at mature age, is adopted into an Indian tribe. He is not an "Indian" within the meaning of the law. *Id.* 4 St. 729; 1 Brightly's Dig. 430, § 75. 4 Op. 72, *United States v. Rogers*, 4 How. 567. Intercourse law?

The treaty with the Cherokees, concluded at New Echota, in 1835 allows the Indian council to make laws for their own people, or such persons as have connected themselves with them. But it also provides that such laws shall not be inconsistent with acts of Congress. The act of 1834, therefore, controls and explains the treaty. It results from these principles, that a plea, set up by a white man, alleging that he had been adopted by an Indian tribe, and was not subject to the jurisdiction of the circuit court of the United States, is not valid. *Id.*

What means
commerce
with the
tribes?

Commerce *with* the Indian tribes, means commerce *with* the individuals composing those tribes. *United States v. Holliday*, 3 Wallace, 417.

The cotton grown in the Indian country and shipped to ports of the United States for sale, is not subject to the Internal revenue tax levied by the statutes of the 30th June, 1864, and the 13th July, 1866. The case of *R. M. Jones*. Attorney-General, H. Stanbery's opinion, of 24th July, 1867. 12 Op. 206.

All these provisions fortify the conclusion at which I have arrived, that cotton produced in the Choctaw nation does not come within their operation. A tax on cotton produced there or manufactured there, or sold there, cannot be levied, assessed or collected under the provisions of these acts. Nor is there any thing in these acts to forbid its removal or sale to any part of the United States. Being a production of the Indian country by express statutory enactment, it is not liable to any import or transit duty. There is no lien upon it for any tax at the place of production, nor is any permit for its removal necessary. "I am clearly satisfied that the omission in the various Internal revenue laws, to provide for the organization of collection districts over the Indian territory was not fortuitous or accidental, and that it was the settled purpose of Congress not to subject the persons or the productions of Indians existing under their regular tribal associations, to liability for any tax imposed by these acts.—If the provisions as to the specific article of cotton apply to Indian territory, I see no reason why all the other forms of tax provided for in these acts are not equally applicable to Indian territory. We must, consequently make them subject to taxation in reference to stamps, income, and descents in succession, as well as for other purposes. The intent of Congress not to include them in any sort of taxation, I think is clear enough from the language of the acts themselves. But all other considerations which apply to them, equally forbid this idea of Federal taxation. Their rights are defined by independent treaties. They are in a state of tutelage and protection under the United States. Laws in which they are not mentioned, are never understood to apply to them. Even when these Indians and their territory are situated within the bounds of a State of the Union, they are not subject to State taxation. In recent cases before the supreme court of the United States, at its December term, 1866, speaking of the condition of the Indian tribes under treaty with the United States, it used this language: 'The object of the treaty was to hedge the lands around with guards and restrictions, so as to preserve them for the permanent homes of the Indians. In order

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to accomplish this object they must be relieved from every species of levy, sale, and forfeiture—from a levy and sale for taxes, as well as the ordinary judicial levy and sale.' The Kansas Indians, 5 Wall. 760, 761. Again the Courts say, in reference to the tribal association of the Shawnees, that 'they are a people distinct from others, capable of making treaties, separated from the jurisdiction of Kansas, and to be governed exclusively by the government of the Union. If under the control of Congress, from necessity, there can be no divided authority.—If they have outlived many things they have not outlived the protection afforded by the Constitution, treaties, and laws of Congress.—It may be that they cannot exist much longer as a distinct people in the presence of the civilization of Kansas; but until they are clothed with the rights and bound to all the duties of citizens, they enjoy the privilege of total immunity from State taxation.' (Id. 755, 756). And again:—'As long as the United States recognizes their national character they are under the protection of the treaties and the laws of Congress, and their property is withdrawn from the operation of State laws.' (Id. 757.) Such is the well-established policy of the United States with regard to the total exemption of the Indian tribes from State taxation. The tenor of all the treaties shows that the idea of subjecting them to taxation by the General Government, was never entertained, and certainly hitherto it has never been attempted. I am, therefore, clearly of opinion that the particular cotton in question was not liable to taxation under our Internal revenue laws, either while in the Indian country or in transit through any collection district of the United States, or in the collection district where it may have been found or may have been sold. Until the Indians have sold their lands, and removed from them in pursuance of the treaty stipulations, they are to be regarded as still in their ancient possessions, and are in under their original rights, and entitled to the undisturbed enjoyment of them. (Fellows v. Blacksmith, 19 How. 366.) The New York Indians, 5 Wall, 770."

In the argument of the case of R. M. Jones before the Attorney-General, the Editor, who prosecuted the claim to have the tax, illegally collected, refunded, cited the following authorities: The State v. Ross, 7 Yerg. 74; United States v. Cisna, 1 McLean, 254; Cherokee Nation v. Georgia; Worcester v. Georgia; and Johnson v. McIntosh, cited elsewhere in this note. And the following cases to show that while Indians reside within the States as portions of tribes, they are not within State jurisdiction, as citizens subject to the burdens and benefits of State laws: Danforth v. Wear, 9 Wheat. 673; Lee v. Glover, 8 Cow. 189; Strong v. Waterman, 11 Paige, 807; Harmon v. Partier, 12 Sm. & Marsh. 425; Marsh v. Brooks, 8 How. 223; Fellows v. Lee, 3 Denio 628; Wall v. Williams, 8 Ala. 48 and 11 Ala. 826; Brashear v. Williamson, 10 Ala. 630; Parks v. Ross, 11 How. 427; Jones v. Laney, 2 Tex. 342. And as to the power of the United States over the Indian country, See United States v. Rogers, 4 Howard, 567.

What are the relations of the Indian tribes?

92. These various authorities settle the general propositions:

1. That the Indian tribes are dependent subordinate States,

whose political relations with the United States are defined by treaties.

2. That "commerce with the Indian tribes" is subject to the exclusive control of Congress, and it has only been regulated by treaties and intercourse laws.

81. 3. That Indians are not embraced by acts of Congress, unless they be named therein. Opinion of Judge Lewis, Commissioner of Internal Revenue, 1863.

And see 9 Op. 27. The Indians owe no allegiance to the United States. They may make war upon them without incurring the guilt of treason. Op. of Judge Lewis, Commissioner of Internal Revenue. "Though he holds his lands within the limits of the United States, he is not politically within its limits, nor has it jurisdiction over him." Judge Lewis. The stamp tax does not apply to the Indian reservations, when sold by the tribe; nor does any part of the laws in relation to Internal Revenue. Id. The court follows the executive as to the recognition of the tribal relations. Id. Cites *The Cherokee Nation v. Georgia*, 5 Peters, 1, and *Worcester v. Georgia*, 6 Peters, 515.

What as to
naturaliza-
tion?

Bankruptcy?

[4.] To establish a uniform rule of naturalization; and uniform laws on the subject of bankruptcies throughout the United States.

What is nat-
uralization?

17, 18, 205,
209.

What is ex-
patriation?

274.

220, 221, 222.

Is the power
exclusive?

Where alone
is the power
of naturali-
zation?
120-123.

93. NATURALIZATION.—In its popular, etymological, and legal sense, signifies the act of adopting a foreigner and clothing him with all the privileges of a native citizen or subject. 9 Op. 359; Coke Litt. 199a; 1 Bl. Com. 374; 2 Kent's Com. 64-67. These laws are based upon the acknowledged principle of expatriation. Bates on Citizenship, 13. A naturalized citizen becomes a member of society, possessing all the rights of a native citizen, and standing on the footing of a native. The power is to prescribe a "uniform rule," and the exercise of this power exhausts it, so far as respects the individual. The Constitution then takes him up, &c. Osborn v. Bank of United States, 9 Wh. 827. *Expatriation* includes not only emigration out of one's native country, but *naturalization* in the country adopted as a future residence. 9 Op. 359; 8 Op. 125; Paschal's Annotated Digest, p. 920, note 1168, where the authorities are collected; Halleck's International Law 696; Rawle's Const. 95-101; Sergeant's Const. ch. 28, 30; 2 Kent's Com. 35, 42. The naturalized foreigner is protected against the conscript laws of his native sovereign. Ernest's Case, 9th Op. 357-363. The power to naturalize is exclusive in the Federal government. The Federalist, No. 32, 42; *Chirac v. Chirac*, 2 Wheat. 259, 269; Rawle's Const. 84-88; *Houston v. Moore*, 5 Wheat. 48, 49; *Golden v. Prince*, 3 Wash. C. C. R. 313, 332; 1 Kent's Com. 397.) Story's Const. § 1104; *Thurlow v. Massachusetts*, 5 How. 505; *Smith v. Turner*, 7 How. 556. The power must be exclusive or there could be no "UNIFORM RULE." (Federalist, No. 32;) Story's Const. 1104. While the Constitution gave to the citizens of each State the privileges and immunities of citizens in the several States, it, at the same time, took from the several States the power of naturali-

zation, and confined that power exclusively to the Federal government. The right of naturalization was, therefore, with one accord, surrendered by the States, and confined to the Federal government. *Golden v. Prince*, 3 Wash. c. c. 314. Naturalization is confined to persons born in foreign countries. *Scott v. Sandford*, 19 How. 417-419. The Constitution has conferred on Congress the right to establish uniform rules of naturalization, and this right is evidently exclusive. *Id.* 405. Negroes cannot be naturalized. *Id.* And no law of a State, passed since the Constitution was adopted, can give any right of citizenship outside of its own territory. *Id.* The naturalization law of 1790, only extended the privilege "*to aliens being free white persons.*" *Id.* Citizenship at that time was perfectly understood to be confined to the white race. *Id.* Congress might have authorized the naturalization of Indians, because they were aliens and foreigners. *Id.* 420. For the latest collection of the naturalization laws and notes thereon, see *Paschal's Anno-tated Digest*, arts. 5392-5412; notes 1168-1172, and 148-150. A free white person born in this country, of foreign parents, is a citizen of the United States. (*Lynch v. Clarke*, 1 Sandford's Ch. R. 583.) 9 Op. 374. This is a universal principle unless changed by statute, as in our own statute to prevent the alienage of children born abroad. 10 St. 604. *Bates on Citizenship*, 13.

Allegiance on the one side, and protection on the other, constitute citizenship under the Constitution. *Smith v. Moody*, 26 Inda. 305. Allegiance and protection constitute the sum of the duties and rights of a "natural born citizen of the United States." *Bates on Citizenship*, 15. Citizenship cannot depend on *color* or *caste*. *Id.* 14-17. Alienage is the only disability to citizenship recognized in the Constitution. *Id.*

94. UNIFORM SYSTEM OF BANKRUPTCY.—**BANKRUPT** [*banke-rouit*]. Literally from Law French *banke*, Lat. *bancus*, a bench, table, or counter, and *roupt* or *rout*, Latin *ruptus*, broken. One whose bench or counter (place of business) is broken up. In English law, a trader who secretes himself, or does certain other acts tending to defraud his creditors. 2 Bl. Com. 285, 471; *Burrill's Law Dic.* **BANKRUPT**; 4 Inst. Ch. 63; *Story's Const.* § 1112; *Cooke's Bankrupt Laws*, Intr. 1. It is derived from the Roman law. *Idem.* See *Ogden v. Saunders*, 12 Wheat. 264-270; *Sturgis v. Crowninshield*, 12 Wheat. 273, 275, 280, 306, 310, 314, 335, 369; and same case 4 Wheat. 122. By the American law, bankrupts and bankruptcies are not confined to traders. See Acts of April 4, 1800; December 19, 1803; Aug. 19, 1841; 2 March, 1867; *James's Bankrupt Law*, 1867, and notes; *Taylor's Bankrupt Law*; 2 Kent's Com. 390; 2 *Story's Const.* §§ 1111-1115; *Stephens's Com.* 180, 189. The leading features of "a system established by law, as distinguished from ordinary law are, (1), the summary and immediate seizure of all the debtor's property (or the voluntary surrender of it); (2), the distribution of it among the creditors in general; and (3), the discharge of the debtor from future liability from debts then existing." *Archbold's Law and P. of Bankruptcy* (11th ed.) b. 2, pp. 139, 235-237; 2 Burr. 829. The American "SYSTEM" seems to have broken down the distinction between

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90.

Negroes.

274.

209.

Indians.

Who are cit-izens?

220-223.

What are the duties of a citizen?

What is a bankrupt?

95.

"BANKRUPTCY" and insolvency. Burrill's Law Dic., BANKRUPT. Sturgis v. Crowninshield, 4 Wheat. 122, 194, 198, 203; 2 Kent's Com. 321.

What is
bankruptcy?
94. **95. BANKRUPTCY.**—The act, state, or condition of a bankrupt. A *status* or condition fixed by legislative provision. (2 Bell's Com. 214.) A condition following upon the commission of certain acts defined by law. (2 Stephens's Com. 191, 192; Williamson v. Barrett, 13 How. 111. "A breaking up of the bank." Spencer v. Billing, 3 Camp. 312.) In a looser sense, the stopping and breaking up of business, because a man is insolvent, and utterly incapable of carrying it on. (Arnold v. Maynard, 2 Story's R. 354, 359. See Sturgis v. Crowninshield, 4 Wheat. 122, 193, 202). Burrill's Law Dic. BANKRUPTCY. The state of a man unable to pursue his business, and meet his engagements, in consequence of the derangement of his affairs. Crabbe's Rep. 456, 465. See Paschal's Annotated Digest, BANKRUPTCY, note 278, p. 141.

What right
have the
States to
pass bank-
rupt laws?
How far do
state bank-
rupt laws
discharge
debts?
96. The States have authority to pass bankrupt laws, provided they do not impair the obligation of contracts, and provided there be no act of Congress in force to establish a uniform system of bankruptcy conflicting with such laws. Sturgis v. Crowninshield, 4 Wh. 132, 273, 275, 280, 306, 314, 335, 369; McMillan v. McNeil, Id. 209. But an act of a State legislature which discharges a debtor from all liability for debts contracted previous to his discharge, on his surrendering his property for the benefit of his creditors, is invalid, so far as it attempts to discharge, on the contracts with his creditors in other States than his residence. Farmers & Mechanics' Bank v. Smith, 6 Wh. 131. A mere insolvent law, however, is not within the prohibition. Ogden v. Saunders, 12 Wheat. 213; Mason v. Haile, Id. 370; Boyle v. Zacharie, 6 Pet. 348, 635; Beers v. Hough-ton, 8 Id. 329; Suydam v. Broadnax, 14 Id. 67; Cook v. Moffat, 5 How. 295. The State bankrupt laws do not discharge debts contracted to citizens of other States, unless the contract be payable within the state of the bankrupt. Beers v. Rhea, 5 Tex. 354. This opinion reviews the various decisions of the supreme court of the United States upon the subject, and concurs with their judgments, though it is urged that the opinions have been inconsistent. See Story's Conflict of Laws, § 338-423. The reason of this power is to prevent frauds where the parties or their property may be removed into different States. (The Federalist, No. 32.) Story's Const. § 1105.

The Bankrupt Law of 1841 was held to be constitutional. Klein's Case, 1 How. 277. The power of Congress is not an exclusive grant; it may, therefore, be exercised within constitutional limits by the States. Sturgis v. Crowninshield, 4 Wheat. 122. See James's Bankrupt Law, p. 8. This book gives the Bankrupt Law of 1867, annotated.

Money.

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371.

[5.] To coin money, regulate the value thereof, and of foreign coin; and fix the standard of weights and measures.

97. TO COIN.—To stamp and convert into money, as a piece of metal; to mint; in a more general sense, to form by stamping; as, to coin a medal. 2. To make or fabricate; to invent; to originate; as, to coin a word. Webster's Dic., COIN.

"To COIN MONEY," clearly means to mould into form a metallic substance of intrinsic value, and stamp on it its legal value. The thing so coined is itself "*money, ipse loquiter*"; but a treasury note is only a promise to pay money, and at the utmost, can only be, like a *bank bill*, or a bill of exchange, a representative of money. Griswold v. Hepburn, 2 Duvall's Ky. Rep. 29. The phrase means "to coin metal as the money of the United States" "They intended that nothing else than metallic coin should be money, or be a legal tender, *immutum*, as *money*. Id. 33, 34. "Currency" is not money. Id. 33, 46, 47.

The articles of confederation read "To coin money and emit bills of credit." (*Ante*, Art. IX., p. 17.) The latter words were stricken out of a draft of the present Constitution. Id. The debate given in full. Id. 31, 32; Madison papers, 1343-4-5-6; Daniel Webster; United States v. Marigold, 9 How, 567; Craig v. Missouri quoted. Id. 37, 38. And see the dissentient opinions, in the Pennsylvania legal tender cases. 52 Penn. State Reports, 1-100.

A contract may be satisfied by a payment of what is a legal tender at the time the contract is to be performed or the debt falls due, although in depreciated money. (Davies Reports, 48.) Shollenberger v. Brinton, 52 Penn. (2 P. F. Smith), 46. The constitutionality is maintained in the opinions of a majority of the judges, from pages 57 to 100.

This clause itself would carry along the right to regulate the value of money. (Madison's Letter to Cabell, 18th Sept., 1828.) Story's Const. § 1117.

98. MONEY.—Is the universal medium or common standard, by comparison with which the value of all merchandise may be ascertained; or it is a sign which represents the respective values of all commodities. (1 Black. Com. 276.) Story's Const. § 1118.

Our review of the legislation of Congress has shown us that Congress has uniformly declared the money so coined, and the value of which has thus been regulated, should be received as a legal tender in payment of debts equally, whether due to the government or to private individuals, &c. Metropolitan Bank v. Van Dyck, 27 N. Y. 426.

The coin has no pledge of redemption; the intrinsic value is not a question; the treasury notes have a pledge for redemption; and they may become a substitute for coin. (Madison's Message.) Metropolitan Bank v. Van Dyck, 27 N. Y. R. 430, 431.

99. AND REGULATE THE VALUE.—For a history of the acts regulating the value of money and prescribing legal tenders, see Metropolitan Bank v. Van Dyck, 27 N. Y. Rep. 424. This power is limited to the coining and stamping the standard of value upon what the government creates or shall adopt, and to punishing the offense of producing a false imitation of what may have been so created or adopted. Fox v. Ohio, 5 How. 433.

This power is exclusively in Congress. Rawle's Const. 102.

What are the restrictions as to legal tender?

97.

84.

71.

Is intrinsic value of consequence?

97.

What is a standard?

What is a ton?

101.

What is a standard pound of U. S.?

How often is standard regulated?

What is the standard of spirit weight?

100. There is no express grant of power to make gold and silver, or any thing else, a legal tender. *Metropolitan Bank v. Van Dyck*, 27 N. Y. Rep. 426. But the power has been uniformly exercised ever since the foundation of the government, unquestioned by any department of the Federal and State governments. This contemporaneous construction is to be received as evidence of the power. (*Martin v. Hunter*, 1 Wh. 421; *Cohens v. Virginia*, 6 Wh. 421; *Briscoe v. The Bank of Kentucky*, 11 Pet. 527; *Moors v. The City of Reading*, 21 Penn. 188; *Norris v. Clymer*, 2 Penn. 277; *The People v. Green*, 2 Wend. 274; *The People v. Coutant*, 11 Wend. 511.) *Metropolitan Bank v. Van Dyck*, 27 N. Y. Rep. 427-8. A discretionary power must exist somewhere in every government. *Story's Const.* § 425; *Anderson v. Dunn*, 6 Wh. 204, 220; *Metropolitan Bank v. Van Dyck*, 27 N. Y. Rep. 429. The intrinsic value of the metal on which money is coined is of no consequence. *Id.* 430.

Where a party deposited money with his banker upon general principles, it became a loan to the bank, which fact is not overruled by the word "gold," against the amount on the depositor's bank book. In such cases a tender of United States legal tender treasury notes is sufficient. The depositor cannot demand gold as his special deposit. *Thompson v. Riggs*, 5 Wallace.

101. "TO FIX THE STANDARD OF WEIGHTS AND MEASURES." To FIX is to make permanent, to regulate. *Webster's Dic.* FIX. A STANDARD is that which is established by authority, as the rule to measure a quantity, as a gallon, a pound, or a weight. *Webster.* The States are not expressly inhibited from exercising this power; and in the absence of Congressional legislation, it has been tolerated. *Rawle's Const.* 102; *Story's Const.* § 1122.

102. "WEIGHTS AND MEASURES."—A "ton" is twenty hundred weight; each hundred weight being 112 pounds. Act of 30th Aug., 1842. 1 *Brightly's Dig.* 370, § 218.

The brass troy pound weight, procured by the Minister of the United States in London, in the year 1827, for the use of the mint, and now in the custody of the director thereof, shall be the standard troy pound of the mint of the United States, conformably to which the coin thereof shall be regulated.

It shall be the duty of the director of the mint to procure and safely keep a series of standard weights corresponding to the aforesaid troy pound, consisting of a one-pound weight, and the requisite subdivisions and multiples thereof, from the hundredth part of a grain to twenty-five pounds. And the troy weights ordinarily employed in the transactions of the mint, shall be regulated, according to the above standards, at least once in every year, under his inspection; and their accuracy tested annually in the presence of the assay commissioners, on the day of the annual assay. Act of 19th May, 1838, 4 St. 278; §§ 3, 4; 1 *Brightly's Dig.* p. 635, §§ 46, 47.

That proof spirit shall be held and taken to be that alcoholic liquor which contains one-half its volume of alcohol of a specific gravity of seven thousand nine hundred and thirty-nine ten thou-

sandths (7,939) at sixty degrees Fahrenheit; and the Secretary of the Treasury is hereby authorized to adopt, procure, and prescribe for use such hydrometers, weighing and gauging instruments, meters, and other means for ascertaining the strength and quality of spirits subject to tax, &c., and to insure a uniform and correct system of inspection, weighing and gauging spirits subject to tax throughout the United States, &c. Act of 2d March, 1867, 14 St. 481.

The following is the first general act of Congress which I find on the subject of weights and measures; and certainly it is of sufficient importance to occupy a place in a Manual of this kind:—

CHAP. CCCI.—“An Act to authorize the use of the Metric System of Weights and Measures. Act of 28th July, 1866, 14 St., 339, 340.

Be it enacted, &c., That from and after the passage of this act it shall be lawful throughout the United States of America to employ the weights and measures of the metric system; and no contract or dealing, or pleading in any court, shall be deemed invalid or liable to objection because the weights or measures expressed or referred to therein are weights or measures of the metric system. What is the standard of weights and measures?

2. The tables in the schedule hereto annexed shall be recognized in the construction of contracts, and in all legal proceedings, as establishing, in terms of the weights and measures now in use in the United States, the equivalents of the weights and measures expressed therein in terms of the metric system; and said tables may be lawfully used for computing, determining, and expressing in customary weights and measures the weights and measures of the metric system. The metric system. What schedule shall be recognized?

MEASURES OF LENGTH.

What for measuring length?

METRIC DENOMINATIONS AND VALUES.		EQUIVALENTS IN DENOMINATIONS IN USE.
Myriameter	10,000 meters.	6.2137 miles.
Kilometer.....	1,000 meters.	0.62137 miles, or 3280 feet and ten inches.
Hectometer	100 meters.	328 feet and 1 inch.
Dekameter.....	10 meters.	39.37 inches.
Meter	1 meter.	39.37 inches.
Decimeter	$\frac{1}{10}$ of a meter.	3.937 inches.
Centimeter.....	$\frac{1}{100}$ of a meter	0.3937 inches.
Millimeter.....	$\frac{1}{1000}$ of a meter.	0.0394 inches. (0.03937)

MEASURES OF SURFACE.

Surface.

METRIC DENOMINATIONS AND VALUES.		EQUIVALENTS IN DENOMINATIONS IN USE.
Hectare.....	10,000 square meters.	2.471 acres.
Are.....	100 square meters.	119.6 square yards.
Centare.....	1 square meter.	1550 square inches.

For mea-
sures of sur-
face?

Capacity.

MEASURES OF CAPACITY

For mea-
sures of
capacity.

METRIC DENOMINATIONS AND VALUES.			EQUIVALENTS IN DENOMINATIONS IN USE.	
Names.	Number of liters.	Cubic measure.	Dry Measure.	Liquid or Wine Measure.
Kiloliter, or stere	1,000	1 cubic meter.....	1.308 cubic yards....	264.17 gallons.
Hectoliter	100	$\frac{1}{10}$ of a cubic meter....	2 bushels & 3.35 pecks	26.417 gallons.
Dekaliter.....	10	10 cubic decimeters....	9.08 quarts.....	2.6417 gallons.
Liter	1	1 cubic decimeter....	0.908 quarts.....	1.0567 quarts.
Deciliter.....	$\frac{1}{10}$	$\frac{1}{10}$ of a cubic decimeter	0.1022 cubic inches...	0.845 gills.
Centiliter.....	$\frac{1}{100}$	10 cubic centimeters..	0.6102 cubic inches....	0.388 fluid ozs.
Milliliter.....	$\frac{1}{1000}$	1 cubic centimeter...	0.061 cubic inches....	0.27 fluid dr's.

Weights.

WEIGHTS.

What stand-
ard of
weights?

METRIC DENOMINATIONS AND VALUES.			EQUIVALENTS IN DENOMI- NATIONS IN USE.
Names.	No. of Grams.	Weight of what quantity of water at maximum density.	Avoirdupois weight.
Millier or Tonneau.	1,000,000	1 cubic meter	2204.6 pounds.
Quintal	100,000	1 hectoliter.....	220.46 pounds
Myriagram.....	10,000	10 liters.....	22.046 pounds.
Kilogram or kilo....	1,000	1 liter.....	2.2046 pounds.
Hectogram	100	1 deciliter.....	3.5274 ounces.
Dekagram.....	10	10 cubic centimeters	0.3527 ounces.
Gram	1	1 cubic centimeter	15.432 grains.
Decigram	$\frac{1}{10}$	$\frac{1}{10}$ of a cubic centimeter.	1.5432 grains.
Centigram.....	$\frac{1}{100}$	10 cubic millimeters.....	0.1543 grains.
Milligram.....	$\frac{1}{1000}$	1 cubic millimeter	0.0154 grains.

What power
as to coun-
terfeiting?[6.] To provide for the punishment of counterfeiting
the securities and current coin of the United States.What is
counterfeit-
ing?

103. COUNTERFEITING. [Law Latin, *Contrafactum*.] That which is made in imitation of something, but without lawful authority, or contrary to law, and with a view to pass the false for the true. (Wharton's Lex.) Burrill's Law Dic., COUNTERFEITING.

The making in the semblance of true gold or silver coin any coin having in its composition a less proportion of the precious metal than is contained in the true coin, with intent to pass the same; or the altering of coin of lesser value, so as to make it resemble coin of the higher value. Paschal's Annotated Digest,

Arts. 2113, 2114. See the Act to Punish, 1 Brighly's Dig., p. 215, Art. VII, §§ 73-79

Whether Congress has power to provide for the punishment of passing counterfeit coin, has been doubted. This power is certainly possessed by States. *Metropolitan Bank v. Van Dyck*, 27 N. Y. 420. But Congress may, without doubt, provide for punishing the offense of bringing into the United States, from a foreign place, false, forged, and counterfeit coins made in the similitude of coins of the United States; and also for the punishment of the offense of uttering and passing the same. *United States v. Marigold*, 9 How. 560; *Metropolitan Bank v. Van Dyck*, 27 N. Y. Rep. 450. In *Fox v. Ohio*, 5 How. 435, Mr. Justice McLean dissented; and insisted that Congress has the right (and has exercised it) to punish the uttering of counterfeit coin; and therefore the States have not the same power.

Have the States power to punish counterfeiting?

The right to punish the counterfeiting of the public coin is vested exclusively in Congress; and it cannot be concurrently exercised by the States; and such a State law is void. *Mattison v. The State of Missouri*, 3 Mo., 421.

In *Fox v. The State of Ohio*, this court have taken care to point out that the same Act might, as to its character, tendencies, and consequences, constitute an offense against both the State and the Federal governments, and might draw to its commission the penalties denounced by either, as appropriate to its character in reference to each. (*Fox v. Ohio*, 5 How. 433.) *United States v. Marigold*, 9 How. 560; *Story's Const.* § 1123, note 4.

And see *United States v. King*, 5 McLean, 208; *United States v. Burns*, *Ibid.* 23; *United States v. Brown*, 4 *Ibid.* 142; *United States v. Morrow*, 4 W. C. C. R. 733; *United States v. Gardner*, 10 Pet. 618; *Commonwealth v. Hutchinson*, 2 Pars. 354; *United States v. Hutchinson*, 7 Penn. Law J. 365.

[7.] To establish post-offices and post-roads.

104. "ESTABLISH" is the ruling term; post-offices and post-roads are the subjects on which it acts. The power is thereby given to fix on towns, court houses, and other places throughout our Union, at which there should be post-offices, the routes by which mails should be carried from one post-office to another, to fix the rate of postage, and to protect the post-offices and mails from robbery. (President Monroe's Message, 4th May, 1822, pp. 24-27.) *Story's Const.* § 1129, note 2, of third edition.

What is the just import of these words, and the extent of the grant?

The word "ESTABLISH," in other parts of the Constitution, is used in a general sense. Thus, "to establish justice;" "and establish this Constitution;" "to establish a uniform rule of naturalization and system of bankruptcies;" "such inferior courts as Congress may ordain and establish;" "the establishment of this Constitution;" "an establishment of religion."

8, 13, 93-95, 195, 243, 245. Define establish.

The clear import of the word is, to create, form, and fix in a settled manner. *Story's Const.* § 1131. 101.

The controversy has been between the power to make the roads and the power to fix on and declare them mail routes, after the ex- 372.

tending settlements have opened, established, adopted, or *built* roads and paths. See the subject fully discussed in Story's Const. chap. XVIII. § 1124-1150; and Notes to Third Edition; and 1 Kent's Com. Lect. XII. 267-268.

The Confederate Constitution added this sentence: "But the expenses of the Post-Office Department, after the first of March, in the year of our Lord eighteen hundred and sixty-three, shall be paid out of its own revenues." Paschal's Annotated Digest, 88.

The first year's history of the insurgent government demonstrated the impracticability of the restriction.

What are
post-offices?

105. POST-OFFICES.—As understood, under the Confederation, and since carried out by statutes, and in practice, post-offices may be defined to be the General Post-Office at Washington, presided over by one of the President's advisers, called the Postmaster-General. This office was first held by Dr. Franklin, in 1775. (Story's Const. § 1126, note 1.) It is now an immense palace (with over a hundred rooms), erected and owned by the government, wherein the whole of the postal service of the United States is superintended and the business directed, and where all contracts for mail service are let, and the accounts therefor are settled. The Postmaster-General is assisted by three Assistant Postmaster-Generals, an Auditor, and several hundred clerks. Every postmaster in the United States is a deputy to the Postmaster-General. There are numerous route agents and detectives: and every line of post-roads is well known and carefully watched. Every place in the United States, whether in office, house, tent, booth, boat, vessel, car, wagon, or box, where the mails are opened and the mail matter delivered, is called a "POST OFFICE," and the sworn and bonded deputy who opens and delivers the written and printed matter received, is called a "POSTMASTER;" although many of them might be called "POSTMISTRESSES," as ladies are frequently appointed of late years.

19, 35, 169.

Describe the
postal service.

The first post-office ever established in America seems to have been under an act of Parliament in 1710. (Dr. Lieber's Encyc. Amer., POSTS.) In England the first regular mode adopted was in 1642. (Malkin's Introductory Letter.) In 1790 there were 75 post-offices in the United States; 1,875 miles of post-roads; the amount of postage was \$37,935. In 1828 there were 7,530 post-offices; 115,176 miles of post-roads, and the amount of postage was \$1,659,915. (The American Almanac Repository, Boston, 1830, p. 217; American Almanac for 1832, p. 134; Dr. Lieber's Encyc. Americana, Article POSTS.) Story's Const. § 1125 (3d ed., note 1.)

In 1866 there were 23,828 post-offices; 180,921 miles of post-roads; amount of postage, \$14,386,986.21.

For the rates of foreign postage, and monthly valuable statistics, see "United States Mail and Post-Office Assistant," New York.

The rates for letters are three cents for every half ounce, in the United States. All mail matter is charged by weight.

What improvement
as to carrying
ing suggested?

It is questionable whether the government could peaceably return to the unequal charges of our fathers. It can be hoped, that some public man may yet develop the idea, that a system of carrying the mails by weight would be practicable; more just to the carriers; more economical to the government; and immensely bene-

ficial to the people, as thereby the carrying need not to be profess-
edly limited to *paper*; but (like our immense express companies,
which first forced upon the government the weight system of
tariffs,) every thing might be carried and charged for by the ounce,
with a direct responsibility upon the government for safe delivery.

To the "regulations" of rates may be added the volume of
laws and regulations sent out every year, which establish "post-
offices and post-roads," and regulate the service and punish infrac-
tions of the law.

106. "POST ROADS."—Every railroad, turnpike, wagon-road, What are
path, river, creek, ocean, sea, gulf, lake, and pond, over which post-roads?
mails are transported, may be denominated post-roads.

Every person and corporation engaged in carrying and deliver- Who are
ing the mails, is called a mail carrier or contractor; and they all mail car-
act under official responsibility. It may at once be deduced that riers?
the books, maps, reports and information to be gathered from the
General Post-Office Department is the most valuable to the student
of geography in the United States.

Among the "REGULATIONS" are the rates for carrying mail- What are the
matter, which, in 1846, were changed from the senseless method rates of
of charging the "single letter" at 25 cents and the "double let- charges and
ter" in proportion, regardless of weight or value, to the common the charges?
sense tariff of weights. The present laws regulating post-offices
and post-roads, the rates of postage, the franking privilege, and the
whole mail service, will be found in books issued by the Postmas-
ter-General, and in Brightly's Dig. pp. 363 to 383: see also 2 Bright-
ly's Dig. 750 to 800.

It is under this power that Congress has adopted the mail regula- What are
tions of the Union, and punishes all depredations on the mail. the powers
Sturtevant v. City of Alton, 3 McLean, 393. The power to estab- of Congress?
lish post-roads is restricted to such as are regularly laid out under
the laws of the several States. Cleveland, Painesville and Ashtabula
R. R. Co. v. Franklin Canal Co., Pittsburg L. J., 24th December,
1853; Pennsylvania v. Wheeling and Belmont Bridge Co., 18 How.
421; Dickey v. Turnpike Road Co., 7 Dana, 113; 1 Kent's Com. 281,
282.

But under this power Congress may make, repair, keep open, and 78-80.
improve post-roads. Dickey v. Turnpike Road Co. 7 Dana, 113.
For conflicting views, see 1 Kent's Com. 11th ed. p. 268, note c.

Nothing which tends to facilitate the intercourse between the
States, can be deemed unworthy of the public care. Federalist,
No. 42.

[8.] To promote the progress of science and the What is the
useful arts, by securing, for limited times, to authors power as to
and inventors the exclusive right to their respective authors and
writings and discoveries. inventors?

107. TO PROMOTE [*Promoveo, pro and moveo, to move*] is here To promote
used to advance, foster, and encourage, by all the liberal legislation
which can aid. Worcester's Dic. PROMOTE.

- Progress.** THE PROGRESS [*Progressus, Progredior, advancement*], that is the growth, advancement of, and constant progression. Worc. Dic. PROGRESS.
- Define science.** SCIENCE. [SCIENTIA, from *Scio, Scire* to know.] Knowledge. It is used here in the sense of Abstract, *Mental*, Mathematical, Natural, and Physical Science. (See the whole definitions and synonyms,) Webster's Dic. SCIENCE.
373. As practically illustrated by our legislation, the word has no limitation in the whole range of literature and knowledge, since all authors have a right to obtain copy-rights for their books, maps, pictures, and every thing printed and first published as such in the United States. Clayton v. Stone, 2 Paine, 383; Jollie v. Jaques, 1 Blatch. 618; Binns v. Woodruff, 4 W. C. C. 48; Wheaton v. Peters, 8 Wheat. 591.
- Arts.** "AND USEFUL ARTS."—ART [*Ars, Artis*]. The power of doing something not taught by nature. Worcester's Dic. ART.
- This word is also intimately connected with science.
- Distinguish between science and art.** The distinction between Science and Art is, that *Science* is a body of principles and deductions, to explain the nature of some matter. An *Art* is a body of precepts, with practical skill for the completion of some work. *Science* teaches us to know; an *Art* to do. In *Art* truth is means to an end; in Science it is the only end. Hence the practical arts are not to be classed among the sciences. (Whewell.) Worc. Dic. SCIENCE. Science never is engaged, as art is, in productive application. (Kearslake) Worcester.
- Define secure.** BY SECURING.—[*Securus, se* and *cura*, or without care.] Here used, by protecting in the exclusive use of; to make certain; to put beyond hazard; to assure; to insure; to guaranty. Worcester's Dic. SECURE.
- Why a limited time?** "FOR A LIMITED TIME."—Not perpetually; but for a reasonable time. The Acts of Congress have generally fixed the limit of fourteen years, which was the period in England when the Constitution was adopted. 2 Bl. Com. 406, 407, Christian's notes, 5, 85; Millar v. Taylor, 4 Burroughs, 2303; Rawle's Const. ch. 9, pp. 105, 106; 2 Kent's Com. Lect. 36, pp. 299–306. The case in Burroughs, 2303, exhausts the whole ancient learning on the subject of copy-rights. It is a grant by the government to the author of a new and useful invention, of the exclusive right for a term of years, the practising that invention. Curtis on Patents, p. LX.
- "USEFUL," *utility*, has been long exploded as an unnecessary and superfluous condition. Millar v. Taylor, 4 Bur., 2303; Hall's New York edition, 182. Puffendorf, Lib. 4 c. 5, p. 373, note 1.
- Who is an author?** "TO AUTHORS." [*Auctor*.] He to whom any thing owes its origin; originator; creator; maker; first cause. One who completes a work of science or literature; the first writer of any thing distinct from a translator or compiler. Worc. Dic. AUTHOR.
- How are copy-rights secured?** In the United States, an author has no exclusive property in a published work, except under some act of Congress. Wheaton v. Peters, 8 Pet. 591; Jefferys v. Boosey, 30 Eng. L. & Eq. 1; Dudley v. Mayhew, 3 Comstock, 12. It had been decided in Great

Britain before the revolution, to be a common law right. Story's Const. § 1152. Overruled. *Dudley v. Mayhew*, 3 N. Y. (3 Const.) 12.

The power is confined to authors and inventors; and cannot be extended to the introducers of new works or inventions. Story's Const. § 1153. See *Federalist*, No. 43; 1 Tuck. Black. Com. App. 265, 266; Hamilton's Report on Manufactures, § 8, pp. 235, 236; *Livingston v. Van Ingen*, 9 John. 507; *Journal of Convention*, 260, 261, 327-329.

108. AND INVENTORS.” [*Invenio*; *in*, and *venio*, to come.]

Who are inventors?

To *invent* is to devise something new, not before made, or to modify and combine things before made or known, so as to form a new whole. WORC. DIC. INVENT. One who invents; a contriver. This right was saved out of the statute of monopolies in the reign of King James the First, and has ever since been allowed for a limited period, not exceeding fourteen years. 2 Black. Com. 406, 407; Christian's notes, 5, 8; 2 Kent's Com. Lect. 36, pp. 306-315.

Patents are entitled to a liberal construction, since they are not granted as restrictions upon the rights of the community, but “to promote the progress of science and the useful arts.” *Blanchard v. Sprague*, 3 Sumner, 535; *Grant v. Raymond*, 6 Pet. 218; *Hogg v. Emmerson* 6 How. 486; *Brooks v. Fisk*, 15 Id. 223. The power of Congress to legislate upon the subject of patents is plenary, by the terms of the Constitution; and as there are no restraints on its exercise, there can be no limitation of its right to modify them at its pleasure, so that they do not take away the rights of property in existing patents. *McClurg v. Kingsland*, 1 Id. 206. *Evans v. Eaton*, 3 Wheat. 545; s. c. 7 Wheat. 356; *Evans v. Hettish*, 7 Wheat. 453; *Blanchard v. Sprague*, 3 Sumner, 541. Therefore, Congress has the power to grant the extension of a patent which has been renewed under the act of 1836. *Bloomer v. Stolley*, 5 McLean, 158. Its power to reserve rights and privileges to assignees, on extending the term of a patent, is incidental to the general power conferred by the Constitution. *Blanchard's Gun-Stock Turning Factory v. Warner*, 1 Blatch. 258.

For what are patents granted? 373.

Perhaps there is nothing which has tended more to the rapid development of American genius, character, and improvement, than the laws securing to authors and inventors their rights. The Patent Office is, perhaps, the most commodious house in America. There are collected the applications, specifications, drawings, and models of the inventors, whose works have dispensed with the hand-labor of more millions than the world now contains. From this office issues annually a report of the current inventions. No lover of the development of his country should visit Washington without giving himself a week to examine the wonderful mysteries of the Patent Office.

For a most able treatise upon the law of patents, the reader is referred to the very able work of Curtis on Patents, 1867; to the “PATENT LAWS,” issued by the Patent Office; 1 Brightly's Dig. COPY RIGHT, p. 193; Patents, 721, and accurate notes; 2 Brightly, 353.

Inferior tri-
bunals.
374.

[9.] To constitute tribunals inferior to the Supreme Court.

109. To CONSTITUTE here means to create and organize, defining the jurisdiction.

TRIBUNAL [Lat. TRIBUNAL] Bench of a judge; hence courts of justice, subject to the superior jurisdiction of the Supreme Court. Webster's Dic., TRIBUNAL.

Do State de-
cisions about
real prop-
erty control?

See American Insurance Company v. Canter, 1 Pet. 546. This power affords no pretext for abrogating any established law of property, or for removing any obligation of her citizens to submit to the rule of the local sovereign. Suydam v. Williamson, 24 How. 433. Where any principle of real property has been settled in a State court, the same rule will be applied by this court. (Jackson v. Chew. 12 Wh. 162; Beauregard v. New Orleans, 18 How. 497); Suydam v. Williamson, 24 How. 432, 434. Even to the overruling of our decisions, which have not been followed by the State courts. (Arguello v. The United States, 18 How. 539; League v. Egery, 24 Id. 265-6; Foote v. Egery, Id. 268); Suydam v. Williamson, Id. 434. In the last cases, we followed the interpretation of the Supreme Court of Texas, rather than our own, upon the 4th article of the National Colonization Law of Mexico. Suydam v. Williamson, 24 How. 434. In a case of conflict of jurisdiction between the court of a State and that of the United States, that which first attaches should hold. Taylor v. Carryl, 20 How. 583.

What tribu-
nals have
been estab-
lished under
this power?

The tribunals which have been established under this power are the Circuit Courts and the District Courts of the United States, between which have been divided the controversies between litigants. See Brightly's Digest, pp. 124 to 129, 228 to 231.

And to these may properly be added the court of claims, which has a special limited jurisdiction in certain suits against the United States, and the commissions and tribunals created at different times for the trial of certain land claims arising under the treaties with France, Spain, and Mexico.

Define the
special
power on
crimes.

[10.] To define and punish piracies and felonies committed on the high seas, and offenses against the law of nations.

What is to
define?

110. To DEFINE is to give the limits or precise meaning of a word or thing in being; to make, is to call into being. Congress has power to *define*, not to make, the laws of nations; but Congress has the power to make rules for the government of the army and navy. James Speed, Attorney-General, upon the right to try by Military Commission, the conspirators to murder President Lincoln, July, 1865, p. 4.

How has
Congress de-
fined?

111. To PUNISH, in this sentence, is to inflict the penalty of the law, which, in cases of piracy, is, by the law of nations, death. Had Congress simply declared that piracy should be punished with death, the offense would have been sufficiently *defined*. Congress may as well *define* by using a word of known and determinate meaning, as by an express enumeration of all the particulars in-

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111.

110.

cluded in that term. But it was intended not merely to define piracy as known to the law of nations, but to enumerate what crime in the national code should be deemed piracy. And so the power has been practically expounded by Congress. (*United States v. Smith*, 5 Wheat. 153–163.) Story's Const. § 1159; 1 Stat. 113, 3 Stat. 600.

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112. "PIRACY" is robbery or forcible depredation on the *high seas*, without lawful authority, and done, *animo furandi*, in the spirit and intention of universal hostility. 1 Kent's Com. 183; Story's Const. § 1160. The acts which, if committed upon land, would have amounted to felony there. 2 East. Pl. of the Crown, 796. It is the same offense at sea with robbery on land. 1 Kent's Com. 183; Wharton's Am. Crim. Law, §§ 2816–2855. The crime of piracy is defined by the law of nations with reasonable certainty. *United States v. Smith*, 5 Wh. 153. And see Story's Const. § 1158, 1159; The Federalist, No. 4; Rawle on the Const., ch. 9, p. 107; 2 Elliott's Debates, 389, 390. A PIRATE is a rover and robber upon the sea, an enemy to the human race. Cowel; Webster; 3 Inst. 113; Burrill's Law Dic., PIRATE; 4 Bl. Com. 71–73. Piracy is defined by Congress in the Acts 13 April, 1790, 1 Stat. 113; and 15 May, 1820, 3 Stat. 600. Brightly's Dig. 207, 208.

What is piracy?

113. FELONY comprises every species of crime which occasioned, at common law, the forfeiture of lands and (or) goods. All offenses which are capital, and some which are not capital. (Co. Litt. 391; 2 Black. Com. 93–98;) Story's Const. 192–194, 1161. Felony is a loose term, and needs to be defined. (Federalist, No. 42; Elliott's Debates, 389, 390); Story's Const. § 1160; Burrill's Law Dic., FELONY, where there are many learned citations of original authors. Woodeson's Lec. 306.

What is felony?

Felony on the high seas seems not to be of a technical common law, but of civil law definition. (*United States v. Smith*, 5 Wheat. 153, 159; 3 Inst. 112; Co. Litt. 391, *a*); Story's Const. 1162.

What is felony on the high seas?

The Acts of 26 March, 1804, 2 Stat. 290; 3 March, 1825, 4 St. 115; 3 March, 1835, 4 St. 775; 8 Aug. 1846, 9 St. 73, all define and punish felony. 1 Brightly's Dig. 208–211.

114. "HIGH SEAS" [*Altum mare*.] Not only the waters of the ocean, which are out of sight of land, but the waters on the sea-coast, below low-water mark, whether within the territorial boundaries of a nation or of a domestic State. (*United States v. Pirates*, 5 Wheat. 184, 200, 204, 206; *United States v. Wilberger*, 5 Wheat. 76, 94). Story's Const. § 203, 1164. And see, 4 Black. Com. 110; Constable's Case, 5 Co. Rep. 106; 3 Inst., 13; 2 East's P. C. 802, 803; Hale in Harg. Law tracts, ch. 4, p. 10; 1 Hale's P. C., 423, 424.

What are the high seas?

As to the States of the Union, "High Seas" may here be taken to mean that part of the ocean which washes the sea-coast, and is within the body of any county, according to the common law; and as to foreign nations, any waters on their seacoast below low-water mark. (Rawle's Const. ch. 9, p. 147; 3 Id. 439, 441; Sergt's. Const. ch. 28, [ch. 30]; 1 Kent's Com. Lect. 17, p. 342; *United States v. Grush*, 5 Mason's R. 290); Story's Const. § 1164; 1 Kent's Com.

397; *Waring v. Clark*, 5 How. 453, 462; *Pyrodus v. Howard*, 7 Pet. 342, 324; *Howard v. Ingersoll*, 13 How. 421, 424; *Schooner Harriet*, 1 Story's R. 259 *Jones v. Root*, 6 Mass. 435; The case of *Waring v. Clarke*, 5 How. 451-504, exhausts the whole learning on the subject. *Howard v. Ingersoll*, 13 How. 421-424; *Angel on Tide-waters*, ch. 3, p. 53; *Id.* ch. 1, pp. 15-34.

What are offenses against the law of nations?

192-124.

217-223.

Are all offenses crimes?

252-255.

255.

Define the law of nations.

Can Congress change the laws of nations?

117, 118.

115. "OFFENSES AGAINST THE LAW OF NATIONS."—Many of the offenses against the law of nations, for which a man may, by the laws of war, lose his life, his liberty, or his property, are not *crimes*. It is an offense against the laws of nations and of war to break a lawful blockade, to hold communication or intercourse with the enemy, to act as spy (is an offense against the laws of war, and the punishment for which, in all ages, has been death); to violate a flag of truce, to unite with banditti, jayhawkers, guerillas, or any other unauthorized marauders. And yet these are not crimes. Some of the offenses against the laws of war are crimes, and some not. Because they are crimes, they do not cease to be offenses against those laws; nor because they are not crimes or misdemeanors do they fail to be offenses against the laws of war. Murder is a crime, and the murderer, as such, must be proceeded against in the form and manner prescribed in the Constitution; in committing the murder an offense may also have been committed against the laws of war. For that offense he must answer to the laws of war, and the tribunals legalized by that law.

There is, then, an apparent but no real conflict in the constitutional provisions. *Offenses* against the laws of war must be dealt with and punished under the Constitution as the laws of war, they being a part of the law of nations, direct; *crimes* must be dealt with and punished as the Constitution, and laws made in pursuance thereof, may direct. (*Speed on the Conspirators*, July, 1865. 11 Op. 312.)

116. "LAW OF NATIONS."—A code of public instruction, which defines the rights and prescribes the duties of nations in their intercourse with each other. 1 Kent's Com. 1, 2; Halleck's International Law, § 1, and numerous citations.

Mr. Randolph, then Attorney-General, said: "The law of nations, although not specifically adopted by the Constitution, is essentially a part of the law of the land. Its obligation commences and runs with the existence of a nation, subject to modification on some points of indifference." (See opinion Attorney-General, vol. 1. page 27.) Hence Congress may define those laws, but cannot abrogate them; or, as Mr. Randolph says, may "modify on some points of indifference." (*Speed on the Conspirators*), July, 1865.

That the laws of nations constitute a part of the laws of the land is established from the face of the Constitution, upon principle and by authority. *Id.* 11 Op. 299.

But the laws of war constitute much the greater part of the law of nations. Like the other laws of nations, they exist and are of binding force upon the departments and citizens of the government, though not defined by any law of Congress. *Id.*

Congress can declare war. When war is declared, it must be, under the Constitution, carried on according to the known laws and usages of war amongst civilized nations. Id.

When war is declared how must it be waged?

[11.] To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water.

118.

What is the war power?

117. "TO DECLARE WAR."—See Confederation, Art. IX. p. 14.

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"TO DECLARE," may be as well by a formal recognition, as by a declaration in advance. Thus in our war with Great Britain in 1812: "That war be, and is hereby declared to exist, between the United Kingdom of Great Britain and Ireland and the dependencies thereof, and the United States of America and their territories." Act of 1812, ch. 102; 2 St. 755; Story's Const. § 1174; Talbot v. Seaman, 1 Cranch, 28; Bas v. Tingey, 4 Dall. 37.

How is war declared?

And in the war with Mexico, in 1846, after the commencement of hostilities: "Whereas war exists, with Mexico, by the act of Mexico." 9 St. 9.

So in the qualified war with France, in 1798, which was regulated by sundry acts confining the war within certain limits. Rawle's Const. ch. 9, p. 109.

During the rebellion, the existence of the civil war was recognized in a number of acts of Congress, but there was no formal recognition of the war.

To declare war in Great Britain is the exclusive prerogative of the Crown; and in other countries, it is usually, if not universally, confided to the executive department. (1 Tucker's Black. App. 271; 4 Black. Com. 257, 258.) Story's Const. § 1170. See Federalist, No. 41. See Halleck's International Law, ch. 20-24, pp. 289-992.

WAR is "that state in which a nation prosecutes its right by force." The Prize Cases, 2 Black, 666. (A state of forcible contention; of armed hostility between nations. Grotius de jure bell. lib. 1. c. 1.) Civil war exists when the regular course of justice is interrupted by revolt, rebellion, or insurrection, so that courts of justice cannot be kept open. The Prize Cases, 2 Black, 667. Congress alone has the power to declare a national or foreign war; but not against a State, or any number of States, under the Constitution. But the President may resist the insurrection without a declaration of war. The Prize Cases, 2 Black's Rep. 668, 669.

What is war?

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What is civil war?

132.

234, 235.

A civil war is waged because the laws cannot be peaceably enforced by the ordinary tribunals of the country through civil process and by civil officers. Speed on the power to execute the assassins of the President, p. 5.

Why is civil war waged?

118. As a consequence of the power of declaring war, and making treaties, the government possesses the power of acquiring territory, either by conquest or by treaty. American Ins. Co. v. Canter, 1 Pet. 542; Scott v. Sandford, 19 How. 393. In this case, the power to acquire territory is not rested upon any particular power in the Constitution, but is unqualifiedly asserted to exist. Id. 231, 232.

What can the government acquire under this power?

229-232.

What is the effect of war upon the citizens?

250, 254.

376-378.

What was the effect of the late rebellion?

Does this justify marauders?

115, 116.

112.

How were the assassins tried?

446-7. It would seem to be rested upon the power to admit new States. *Id.* All contracts made by the citizens of one country with the citizens or subjects of another, which countries are at war with each other, are void. *Griswold v. Edrington*, 16 Johns. 444. In this case, Chancellor Kent exhausts the whole learning upon the subject down to 1819. He says: "The law has put the sting of disability into every kind of voluntary communication and contract with an enemy which is made without the special permission of the government." (16 Johns. 483); *Jackson v. Johnson*, 11 Johns. 418; 1 Kent's Com. 66; *The Ann Dodson*, 2 Wh. 27; *The Mary & Susan*, 1 Wh. 57; 2 Cond. 599; *The Julia*, 8 Cr. 181-203; 3 Cond. 152. When one nation is at war with another nation, all the subjects or citizens of the one are deemed in hostility to the subjects or citizens of the other; they are personally at war with each other, and have no capacity to contract. *White et al. v. Burnley*, 20 How. 249; *Ogden v. Lund*, 11 Tex. 690. The court is bound judicially to know when war existed. *Id.*; *The Prize Cases*, 2 Black, 666. The inhabitants are not permitted to pass from the one country to the other. *Ogden v. Lund*, 11 Tex. 690. The military upon the frontier, from the necessity of the case, must be charged with the duty of preventing such intercourse. *Id.* To prevent the running of a ferry between Texas and Mexico, while the United States and Mexico were at war, was lawful, and affords no ground of action against the officer. *Id.* 692. See Constitution of the Confederate States, same section. *Paschal's Annotated Dig.*, note 217. These general rules of law are applicable alike to civil and international wars: that all people, of each State or district, in insurrection against the United States, must be regarded as enemies, until, by the action of the legislature and the executive, or otherwise, that relation is permanently changed. (*The Prize Cases*, 2 Black, 637.) *Mrs. Alexander's Cottop*, 2 Wall. 419; *The Venice*, 2 Wall. 274; *The Prize Cases*, 2 Black, 666.

This power necessarily extends to all legislation necessary to the prosecution of war with vigor and success, except such as interferes with the command of the forces and the conduct of the campaign. *Ex parte Milligan*, 4 Wallace, 139.

When two governments, foreign to each other, are at war, or when a civil war becomes territorial, all of the people of the respective belligerents become, by the law of nations, the enemies of each other. *Speed*. 11 Op. 312.

But this only authorizes hostility by those who are empowered by the express or implied command of the State, &c.

Hence it is that, in land wars, irregular bands of marauders are liable to be treated as lawless banditti, not entitled to the protection of the mitigated usages of war as practiced by civilized nations. (*Wheaton's Elements of International Law*, page 406, 3d edition; *Speed* on the Assassins, p. 9.) *Id.* 314.

"A pirate, an outlaw, or a common enemy to all mankind may be put to death at any time. It is justified by the *law of nature and nations.*" (*Patrick Henry*; 3 *Elliott's Debates on Federal Constitution*, p. 140; *Speed*.)

The assassins were tried by military commission and convicted,

and a part of the conspirators executed, and a part of them sentenced to imprisonment for life. See the volumes containing the trial of the conspirators; and see the trial of Surratt.

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Until Congress passes laws upon the subject of war and reprisals no private citizen can enforce such rights; and the judiciary is incapable of giving them any legitimate operation. (Brown v. United States, 8 Cr. 1.) Story's Const. § 1177. And although Mrs. Alexander had taken the oath of amnesty, while she remained in rebel territory she had no standing in court. Mrs. Alexander's Cotton, 2 Wall. 421. The cotton captured on the land by the naval forces, in a rebellious State, was not the subject of prize. See 9 Op. 524, 525; (Speed, 4-10). The Queen of England recognized the Confederates as neutrals, on the 13th May, 1861. Id. 669. The President must determine when insurrection exists. The Prize Cases, 670. His proclamation of blockade, of 19th April, 1861, is conclusive upon the courts; and neutrals were bound by it. Id. Under this very peculiar Constitution, although the citizens owe a supreme allegiance to the Federal Government, they owe also a qualified allegiance to the State in which they are domiciled. Their persons and property are subject to its laws, and they are liable to be treated as enemies. Id. 673. When the legislative authority has declared war, the executive authority, to whom its execution is confided, is bound to carry it into effect; he has a discretion vested in him, as to the manner and extent; but he cannot lawfully transcend the rules of warfare established among civilized nations. Brown v. United States, 8 Cr. 153. The Supreme Court of the State of Pennsylvania has decided that the United States conscription is unconstitutional. Judge Woodward gave the decision. The following is an abstract:— He starts with the idea that the conscription levies upon, takes, and destroys the militia of the States, and in spite of the States. He shows that in 1706 and 1707 a conscription was attempted in the British Parliament, but laid aside as unconstitutional; and he reasons that our fathers, in making the Federal Constitution, never intended to give a central government power over life and liberty not found even in the British constitution. Standing armies are the jealousies of Britons. Our fathers never intended to raise them by force, independent of the States. General Washington, in suppressing the whisky rebellion of Pennsylvania, paid the most scrupulous attention to the rights, and interests, and laws of Pennsylvania. Citizens cannot be made deserters of before they have been soldiers, as the conscription act declares.

Define the relations during the late rebellion.

To whom is allegiance due?

Id. 17, 220.

What are the president's powers?

What as to conscription?

"There are other features of the conscript law that deserve criticism; but not to extend my opinion further, I rest my objection to its constitutionality upon these grounds:—

"1st. That the power of Congress to raise and support armies does not include the power to draft the militia of the States. 2d. That the power of Congress to call forth the militia cannot be exercised in the forms of this enactment. 3d. That a citizen of Pennsylvania cannot be subjected to the rules and articles of war until he is in actual military service. 4th. That he is not placed in such actual service when his name has been drawn from a wheel, and ten days'

124.

130.

notice thereof has been served upon him." *Kneedler v. Lane*, 9 Wright, 331; 48 Penn. 331.

130-133.

The conscript laws of the Confederacy, which declared every man from seventeen to fifty years of age a soldier, were held, by a majority of the Supreme Court of Texas (under this same power) to be constitutional, Mr. Justice Bell dissenting. *Paschal's Annotated Digest*, notes 217-219; *Ex parte Coupland*; 26 Tex. 394.

What of
marque and
reprisal?

119. "GRANT LETTERS OF MARQUE AND REPRISAL." This power would be incident to the power to declare war. (See Mr. Madison's Letter to Mr. Cabell, 18th Sept., 1828.) *Story's Const.* § 1175.

Define
marque.

120. MARQUE is, in public law, the frontier boundary of a country. And "to grant" is permission to pass the frontier of a country in order to make reprisals. (See *March's Letters of Marque*; 1 Bl. Com. 258.) *Burrill's Law Dic.*, MARQUE. Generally used as synonymous with "*reprisal*." 1 Black, Com. 258. See *Halleck's International Law*, 391-398; *Wheaton's International Law*, part 4, chap. 2, sec. 10.

121. "REPRISAL." [*Reprisalia*.] A retaking; taking back; recaption. The repossessing one's self of a thing unjustly taken by another. 3 Bl. Com. 4. A taking of one thing in satisfaction for another (*captio rei unius in alterius satisfactionem*)—frequently used in the plural *reprisalia*. *Spelman*; *Locce de Jur. Mar.* lib. 3, C. 5; 1 Kent's Com's 61.

What is the
meaning of
reprisal?

A taking in return; a taking by way of retaliation. *Burrill's Law Dic.* REPRISAL. In this case, letters of "*marque and reprisal*" (words used as synonymous, the latter [*reprisal*] signifying a taking in return, the former [*letters of marque*]), the passing the frontiers in order to such taking) contain an authority (grant) to seize the bodies or goods of the subjects of the offending State wherever they may be found, until satisfaction is made for the injury. (1 Black. Com. 258, 259; *Bynkershoek on War*, ch. 24, p 182, by *Duponceanu*; *Valin*, *Traité des Prises*, pp. 223, 321; 1 Tuck Black. Com., App. 271; 4 *Elliot's Debates*, 251.) *Story's Const.* § 1176. *Halleck*, 391, 393.

383, 384.

What is the
power as to
armies?

380.

[12.] To raise and support armies; but no appropriation of money to that use shall be for a longer term than two years.

122. This power did not exist under the Articles of Confederation. For discussions of the limitation and necessities of this power, see 4 *Elliot's Debates*, 220, 221; 1 *American Museum*, 270, 273, 283; 5 *Marshall's Life of Washington*, App., note 1; *Id.* ch. 3, p. 125, 126; ch. 5, p. 212-220; ch. 6, p. 238-248; 2 *Elliot's Debates*, 93, 285, 286, 307, 308, 309, 319, 320, 430, 438; *Federalist*, Nos. 23, 24-29, 41; *Story's Const.* § 1168-1198, 3d ed. and notes.

Define to
raise and
support.

123. "TO RAISE AND SUPPORT," in practice, means to educate, commission, enlist, draft, conscript, feed, clothe, transport and

pay officers and men. See Brightly's Digest, 55-90 and notes; 379.
2 Id. 9-50. During peace as well as war. Story's Const. § 1186-1198.

124. "ARMIES."—Collections or bodies of men, armed for war, Define and organized in companies, battalions, regiments, brigades and armies. divisions, under their proper officers. Webster's Dic. Army. All the military in the service of the United States are called the ARMY of the United States. The power to raise large bodies of men and divide them into "ARMIES" has only been exercised three times since the formation of the government, viz.: In the war with Great 117, 118. Britain, 1812, with Mexico, 1846, and during the late rebellion.

The Army of the United States consists of five regiments of What is the artillery, ten regiments of cavalry, forty-five regiments infantry, present army? the Professors and Corps of Cadets of the United States Military Academy, and the officers and men of the different departments and corps, under the control of the War Department. The ranks of the commissioned officers of this army are: General (Ulysses S. Grant); Lieutenant-General (William T. Sherman); Major-General (five); Brigadier-General (ten); Colonel; Lieutenant-Colonel; Major; Captain; Lieutenant, first and second. 14 Stat. 332; and see the Reports of Sec. of War, 1866 and 1867; and the Army Register. At the close of the rebellion, the army consisted of over a million of men, rank and file, which had been raised by enlistment, drafts, and bounties. The power is unlimited, being an indispensable incident to the power to declare war. See Story's Const. 123. § 1178-1192, and the references; 2 Elliot's Debates, 285, 286, 307, 308, 430; Federalist, Nos. 23, 24, 25, 28. See 1 Brightly's Dig. 55-90; 2 Id. 9-50.

125. Congress has a constitutional power to enlist minors, in What is the the navy or army, without the consent of their parents. United power of States v. Bainbridge, 1 Mass. 71; Case of Emanuel Roberts, 2 enlistment? Hall's L. J. 192; United States v. Stewart, Crabbe, 205; Commonwealth v. Murray, 4 Binn. 487; Commonwealth v. Barker, 5 Id., 423; Commonwealth v. Morris, Phil. R. 381; *Ex parte* Brown, 5 118. Cr. C. C. 554. Public policy requires that a minor shall be at liberty to enter into a contract to serve the State, whenever such contract is not positively forbidden by the State itself. Commonwealth v. Gamble, 11 S. & R. 94; The King v. Rutherford Grays, 1 Barn and Cress, 345. The act of 21st June, 1862, § 2, 12 Stat. 140, 141. 620, repealed the act of 28th September, 1850, which required the consent of parents or guardians for the enlistment of minors, since which repeal minors, between the ages of eighteen and twenty-one, may be enlisted without the consent of the parent or guardian. Follis's Case, 10 Leg. 276. But see United States v. Wright, 2 Leg. Int. 21, and Commonwealth v. Carter, Id.; Henderson's Case, Id. 187, where it is held that the act of 1802 is still in force, and that such enlistment is void. In Shirk's Case, however, a discharge under similar circumstances was refused 20 Leg. Int. 260. The oath of enlistment, though conclusive upon the recruiting officer, is not so upon the courts. Webb's Case, 10 Pittsburg, L. J. 106. *Contra*, United States v. Taylor, 29 Leg. Int. 284; Jordan's case,

379.

11 Am. L. R. 749. A prisoner of war, paroled by the enemy, is not entitled to his discharge, although a minor, until exchanged. Henderson's Case, 20 Leg. Int. 181; 2 Brightly's Dig. p. 24, note.

What right
does war
give over
the citizen?

Each individual in a republic, as in a monarchy, can be required to perform military duty without his consent, if the demand is made by a proper exercise of the national will. *Ex parte* Coupland, 26 Tex., 394. This follows from the unrestricted power to declare war. *Id.* (Cites Hurd. on *Habeas Corpus*, 8; United States v. Bainbridge; Mass. 71; Federalist, 187.) "Militia" is not synonymous with "arms-bearing men;" and it was held that when the citizens

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were conscripted into the "Confederate States" service (under the same clauses), they had no right to choose their officers. *Id.* 396, 397. When a citizen goes into the army raised by Congress, either voluntarily, or in obedience to the law requiring him to do so, he does this as a citizen, and not a militia-man. *Id.* 397. Paschal's Annotated Digest, 217-220, p. 88-91.

For the time being, the right of the State government over him ceases. The opinion endeavors to reconcile this view with the doctrines of States Rights, and held the Confederate conscript law to be constitutional *during* the necessity. *Id.* 397-405. Mr. Justice Bell reviewed the 41st, 29th, 45th and 4th numbers of the Federalist, and denied the constitutionality of the law. *Id.* 405-430.

Define the
war depart-
ment.

This power has led to the establishment of the War Department, presided over by a Secretary and Assistant Secretary of War, to which are attached the following departments, the heads of which have the rank of Brigadier-General, viz.: Adjutant-General, Quartermaster, Subsistence, Pay, Medical, Ordnance, and Bureau of Military Justice; there are four Inspectors-General, with the rank of Colonel, and also an Engineer and Signal Corps. The Chief of Engineers has the rank of Brigadier-General, and the chief signal officer ranks as Colonel of cavalry.

For how
long may
the appro-
priation be?

126. BUT NO APPROPRIATION TO THAT USE SHALL BE FOR A LONGER TERM THAN TWO YEARS. Congress may vote the supplies for but one year or a shorter period, but, imperatively, no appropriation shall be for a longer period than two years. (Federalist, Nos. 26, 41; 2 Elliot's Debates, 93, 308, 309.) Story's Const. § 1188, 1189, 1190.

The English Parliament is not thus restricted. 1 Black. Com. 414, 415; Tucker's Appendix, 271, 272, 379; Federalist, No. 41; Story's Const. § 1190.

Navy?

[13.] To provide and maintain a navy.

Define to
provide and
maintain?

127. "TO PROVIDE AND MAINTAIN," in this clause, is about equivalent "*to raise and support*," in the preceding clause. The present splendid navy of the United States, with its immortal history, is the best refutation of the arguments which were urged against this necessary branch of the service. See Articles of Confederation, Art. IX. ante p. 14. See Federalist, Nos. 11, 24, 29, 41; 2 Elliot's Debates, 319-324; Virginia Resolutions and Report, 7th and 11th Jan., 1800, pp. 57-59; 5 Marshall's Life of Washington, 523-531, Story's Const. § 1193-1198.

122, 123.

123.

128. "NAVY;" [*Navigation—from Navis, a ship.*].—"To build and equip a navy." Articles of Confederation, ante Art. IX. p. 14. The present words are more broad and appropriate. Story's Const. § 1194. It practically means not only to build and equip, but to organize, provide, and maintain a naval department, naval school, coast survey, naval armament, merchant marine; and it is the strongest arm of our harbor defenses, as well as a powerful engine of attack and offensive warfare. 1 Brightly's Digest, 657-680; 2 Id., 315-387. 127.

It is the natural result of the sovereignty over the navy of the United States, that it should be exclusive. Whatever crimes, therefore, are committed on board of public ships of war of the United States, whether they are in port or at sea, are exclusively cognizable and punishable by the government of the United States. The public ships of sovereigns, wherever they may be, are deemed to be extra-territorial, and enjoy the immunities from the local jurisdictions belonging to their sovereign. (See United States v. Bevans, 3 Wheat. 336, 390. The Schooner Exchange, 7 Cr. 116.) Story's Const. § 1168. 110, 116.

This grant of power has been developed in the organization of a Navy Department, over which presides a Secretary of the Navy (at present GIDEON J. WELLES), an Assistant Secretary of the Navy, and other appropriate officers of the bureau.

The ranks of the Naval officers are: Admiral, Vice-Admiral, Commodore, Captain, Commander, Lieut.-Commander, Lieutenant, Master, Ensign, Midshipman. 2 Brightly's Digest, 315, 316, 318; 14 Stat., 515, 516.

[14.] To make rules for the government and regulation of the land and naval forces. How to govern the forces?

129. "TO MAKE RULES," in this connection, means to prescribe the rules of conduct; that is, to enact the necessary laws "for the government and regulation of the land and naval forces." This Congress has done by the enactment of the rules and articles of war, which are always in the hands of military and naval officers, and have become exceedingly familiar to our volunteer civilians during the late war. Define to make rules? 183, 233, 240. 120-127.

For these "Rules" see 1 Brightly's Dig. pp. 73-83, ch. XVI. Arts. I-CL; 2 Brightly, 24-27; 2 St. 359; 12 St. 316, 330, 339, 354, 589, 595, 598, 735, 754; 13 St. 145, 356, 489.

[15.] To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions. What power over the militia?

130. MILITIA.—The national soldiery of a country, as distinguished from a standing military force, consisting of the able-bodied male inhabitants of a prescribed age, who are enrolled, officered, mustered, and trained according to law, but are called into active service only on emergent occasions, such as to suppress insurrections and repel invasions, for the public defense. (Act of Congress, 8 May, Define militia? 234, 235.)

1792; 1 Kent's Com. 262, 266.) Burrill's Law Dic., MILITIA; 1 Brightly's Dig., 619, 624, and notes; 2 Id., 299; 525-597.

189.

The act of 1795, which confers power on the President to call forth the militia in certain exigencies, is constitutional; and the President is the exclusive and final judge whether the exigency has arisen. *Martin v. Mott*, 12 Wh. 19; *Vanderheyden v. Young*, 11 Johns. 150. The power to repel invasion includes the power to provide against the attempt or danger of invasion. *Martin v. Mott*, 12 Wh. 19; 6 Cond. 417. Those called out according to law are subject to court-martial. (*Houston v. Moore*, 3 Wh. 433.) *Martin v. Mott*, 6 Cond. 421; *Moore v. Houston*, 3 Serg. and R. 167; 1 Kent's Com. 267; *Bates on Habeas Corpus*, 5th July, 1861. The President cannot exercise this power. *Bates*, 18th April, 1861.

234, 235.

What are the
president's
powers?

It belongs exclusively to the President to judge when he has the authority to call forth the militia, and his decision is conclusive upon all others. *Martin v. Mott*, 12 Wheat. 19; 1 Kent's Com. 279; and see the same, 244-250; *Story's Const.* § 1210-1215; *Bates on Habeas Corpus*, 5th July, 1861.

235.

And also upon the Courts of the United States. *Luther v. Borden*, 7 How. 1.

The power is to be exercised upon sudden emergencies, upon great occasions of State, and under circumstances which may be vital to the existence of the Union. *Luther v. Borden*, How. 18, 19, 31, 32; *Story's Const.* § 1211.

The President may make his requisitions directly upon the executives of the States, or by orders directed to any subordinate officers of the militia. *Houston v. Moore*, 5 Wheat. 15-16; see 1 Kent's Com. 277-279.

When do
the militia
become
national?

The militia is the militia of the States, respectively, and not of the United States. When called into the service of the General Government, they become national militia after they are mustered at the place of rendezvous designated by national authority, and not until then. (*Houston v. Moore*, 5 Wheat; *Martin v. Mott*, 12 Wheat. 19.)

Define laws
of the Union.

238-240.

131. LAWS OF THE UNION.—This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land. Art. 6, cl. 2. The laws of the Union are of course this supreme law; and the execution of this power is coextensive with the whole subject of constitutional legislation. But the exigency can only arise when there is an actual or threatened resistance to the laws of the United States. See *Bates on Habeas Corpus*, 5th July, 1861.

Define in-
surrection.

234, 235.

132. INSURRECTIONS.—It has often been contended that insurrection here only means that "domestic violence" mentioned in the fourth section of the fourth article, and hence that the power can only be exercised when the legislature or executive of a State demands it.

But insurrection seems to have been treated as resistance to law by a force too strong for the ordinary *posse comitatus*. (2 Elliot's Debates, 292-309; *Federalist*, No. 29.) *Story's Const*

§ 1201. It doubtless has reference to the violences of a domestic faction, or sedition, as contradistinguished from invasion by a foreign enemy. *Id.* And the insurrection may as well be against United States as State authority.

235.

In the Southern States, the word "insurrection" was almost exclusively confined to "risings" by the slave population.

Insurrection is synonymous with sedition, rebellion, revolt. Webster's Dic., REBELLION.

133. "INVASIONS" is here doubtless coupled with the guaranty of the United States "to protect every State against invasion." (Art. IV. sec 4.) But the "invasion" would be none the less so if invited by State authorities, or if no call should be made by the legislature or governor of an invaded State. The act of 1795 seemed to restrict the idea to invasions by a foreign enemy, as in the wars of 1812 and 1846. 1 St. 424; 1 Brightly's Dig. 440 and notes.

Define invasion?

234, 235.

[16.] To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States; reserving to the States, respectively, the appointment of the officers and the authority of training the militia according to the discipline prescribed by Congress.

What is the power as to organizing the militia?

134. This "ORGANIZING, ARMING, AND DISCIPLINING THE MILITIA," would include the whole legislation upon the subject. But practically the power has not been fully exercised in time of peace. It has indeed generally been left to the States, except as to the tactics and the distribution of arms, by quotas among the States. See Act of 8th May, 1792, ch. 33, 1 St. 271; Act of 12th May, 1820, ch. 97; Act of 1821, ch. 68, 3 St. 577; Story's Const. § 1208; 1 Brightly's Dig. 619-624. 2 *Id.* 299 and notes. MILITIA here means the body of arms-bearing citizens, as contradistinguished from the regular army. Webster's Dic. MILITIA. See Coupland, *ex parte*, 26 Tex. 411, 412. For the discussions upon this subject, see 2 Elliot's Debates, 301-318; Luther Martin, 4 Elliot's Debates, 34, 35. If Congress neglect to exercise this power, the States have a concurrent right to do so. *Houston v. Moore*, 3 Sergt. and Rawle, 369. See *Houston v. Moore*, 5 Wheat. 1-56. And see *Luther v. Borden*, 7 How. 1; Story's Const. § 1207.

What does organizing &c., include?

Define militia?

The militia of the several States are not subject to martial law unless they are in the actual service of the United States. *Mills v. Martin*, 19 Johns. 7. And this does not commence until their arrival at the place of rendezvous. *Houston v. Moore*, 5 Wh. 20. So far as Congress has provided for organizing the militia, the legislative powers of the States are excluded. *Id.* 51; *Houston v. Moore*, 3 S. & R. 169. But a State legislature may lawfully provide for the trial, by courts-martial, of drafted militia who shall re-

Is conscription constitutional?

118, 124.

fuse or neglect to march to the place of rendezvous, agreeably to the orders of the Governor, founded on the requisition of the President of the United States. *Id.* The act of the Congress of the United States, of the 3d March, 1863, 12 Stat. at Large, § 172, declared, that all citizens of the United States, &c., "are hereby declared to constitute the national forces, and shall be liable to perform military duty in the service of the United States, when called out by the President for that purpose." In New York, it has been determined, that this act is unconstitutional, on the ground that it attempted to create a *national militia*, a power not granted to the Federal Government, which is only empowered to raise an army and navy; whilst the militia is but a *State* force, though liable to be called into the service of the United States, by the President, in case of emergency. *The People v. Stephens*, before McCunn, J., at Chambers, 14th July, 1863. In Pennsylvania, however, Cadwallader, J., decided that the act was constitutional. *Antrim's Case*, 20 Leg. Int. 200; 2 Brightly's Dig. 40, note *a*; *Kneedler v. Lane*, 9 Wright, 238. See *ex parte Coupland*, 26 Tex. 394, where it was held that a conscript law, which declared all men between the ages of 17 and 50 years, was constitutional.

What is the power over the militia?

135. When called out, they are subject to the rules and articles of war, save only that, when tried by court-martial, the court shall be composed of militia officers. (1 Brightly's Dig. p. 622, sec. 4; p. 82, sec. 270.) *Atty. General Bates*, 18th April, 1861.

The obvious theory of the Constitution and law is, that whilst Congress shall prescribe, by general rules, an uniform militia system for the States, securing the enrollment of all the able-bodied white male citizens, and maintaining the system of discipline and field exercise observed in the regular army (1 Brightly, 621), yet that the details, militia organization, and management shall be left to the State governments, requiring that only an annual report of the condition of the service shall be left to the President. *Idem.*

This power was first exercised to suppress the insurrection in Pennsylvania, in 1794. (5 Marshall's Life of Washington, ch. 8, pp. 576-592; 2 Pitk. His. ch. 23, pp. 421-592; the next, during the war of 1812, with Great Britain; and the last was the memorable occasion, to suppress the rebellion, on the 13th of April, 1861, and during its continuance. See the Act of 1795, 1 St. 424; *Houston v. Moore*, 3 Sergt. & R. 169; and S. C. 5 Wheat. 60; *Martin v. Mott*, 12 Wheat. 19; *Duffield v. Smith*, 3 Sergt. & R. 590; *Vanderheyden v. Young*, 11 Johns. 150.

Where has congress exclusive power of legislation?

355, 386.

[17.] To exercise exclusive legislation in all cases whatsoever over such district (not exceeding ten miles square), as may, by cession of particular States and the acceptance of Congress, become the seat of the Government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the State in which the same shall be,

for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings. And,

136. "EXCLUSIVE LEGISLATION OVER THE DISTRICT."—This provision was executed by the cession of the District of Columbia by Maryland and Virginia; and the legislation by Congress over the inhabitants and public property there ever since. See 1 Brightly's Dig. p. 233-252. Congress retroceded to Virginia, Alexandria and the surroundings, so that the District is, in fact, only about seven miles square. For the reasons for this exclusive government, see the Federalist, No. 43; 2 Elliot's Debates, 92, 321, 322, 326; Rawle's Const. ch. 9, p. 112, 113. See 2 Brightly's Dig. 233-252. By what states was the district ceded?

The site was selected by President WASHINGTON, after whom the capital was named. The inhabitants are citizens of the United States; and might constitutionally have a local legislature. See the Federalist, No. 43; United States v. Bevens, 3 Wheat. 336, 388.

In its exercise, Congress acts as the legislature of the Union. Cohens v. Virginia, 6 Wheat. 424. The elective franchise allows no distinction on account of race or color. 14 Stat. 375.

137. This includes the power of taxation. Loughborough v. Blake, 5 Wh. 317. The charter of the City of Washington did not authorize the corporation to force the sale of lottery tickets in States whose laws prohibited such sales. Cohens v. Virginia, 6 Wh. 264. Define the powers? 136, 137.

The right of exclusive legislation carries with it the right of exclusive jurisdiction. United States v. Coryell, 2 Mas. 60 91; 6 Opin. 577. Even to recapture by military force. 9 Op. 521. This second clause binds all the United States. (Cohens v. Virginia, 6 Wheat. 224.) Story's Const. § 1229.

Congress has the right to punish murder in a fort, or other place within its exclusive jurisdiction; but no general right to punish murder committed within any of the States. Idem. The power to legislate in these places, ceded by a State, carries with it, as an incident, the right to make that power effectual. Cohens v. Virginia, 6 Wheat. 428. Congress does not act as a local legislature, but exercises this particular power, like all other powers, in its high character as the legislature of the Union. Id.; Story's Const. § 1234. But the purchase of lands by the United States for public purposes, within the territorial limits of a State, does not of itself oust the jurisdiction or sovereignty of such State, over the lands so purchased. United States v. Coryell, 2 Mas. 60. The Constitution prescribes the only mode by which they can acquire land as a sovereign power; and, therefore, they hold only as an individual when they obtain it in any other manner. Commonwealth v. Young, Brightly, 302; People v. Godfrey, 17 Johns. 225; United States v. Traver, 2 Wh. Cr. Cas. 490; People v. Lent, Id. 548. It seems, however, that the States have not the right to tax lands purchased by the United States for public purposes, although the consent of the legislature may not have been given to the purchase. United States v. Weise, 2 Wall. Jr. 72. And see 7 Opin. 628. And see Commonwealth v. Cleay, 8 Mass. 72;

Rawle's Const. ch. 27, p. 238; Sergeant's Const. ch. 28 [ch. 30]; 1 Kent's Com. Lect. 19, pp. 402-404; Story's Const. § 1222-1224.

After a cession by a State, it cannot take cognizance of any acts done in the ceded places after the cession. And the inhabitants of those places cease to be inhabitants of the State, and can no longer exercise any civil or political rights under the laws of the State. But if there has been no cession, the State jurisdiction still remains. (*The People v. Godfrey*, 17 Johns. 225; *Commonwealth v. Young*, 1 Hall's Journal of Jurisprudence, p. 47; 1 Kent's Com. Lect. 19, p. 403, 404; ch. 28 [ch. 30]; Rawle's (Const. ch. 27, p. 238-240); Story's Const. § 1127.

What are the
general pow-
ers of Con-
gress?

71.

[18.] To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or office thereof.

Define nec-
essary?
269, 253, 259.

138. This does not mean absolutely necessary, nor does it imply the use of only the most direct and simple means calculated to produce the end. *Commonwealth v. Lewis*, 6 Binn. 270-1; *McCulloch v. Maryland*, 4 Wh. 413; *Metropolitan Bank v. Van Dyck*, 27 N. Y. Rep. 438-9. And, therefore, Congress had power to charter the Bank of the United States, as a necessary and useful instrument of the fiscal operations of the government. *Id.* 316, 422. So, also, Congress has power, under this general authority, to provide for the punishment of any offenses which interfere with, obstruct, or prevent commerce and navigation with foreign States and among the several States, although such offenses may be done on land. *United States v. Coombs*, 12 Pet. 78. *Necessary* and *proper* are to be considered synonymous terms. *Metropolitan Bank v. Van Dyck*, 27 N. Y. Rep. 439. There is no warrant for saying that the powers shall be construed *strictly*. A reasonable import of terms should be given. (*Martin v. Hunter*, 1 Wh. 304, 326-7.) *Metropolitan Bank v. Van Dyck*, 27 N. Y. Rep. 413, 415. See *Federalist*, 33, 44.

Is this a
power or a
limitation?
93, 94.

This section is among the powers of Congress, not the limitations; it enlarges and adds to, but does not diminish or lessen the powers. (*McCulloch v. Maryland*, 4 Wh. 413.) *Metropolitan Bank v. Van Dyck*, 27 N. Y. Rep. 443. Under this power, Congress may exempt the national securities from taxation. (*The People v. The Tax Commissioners*, 2 Black, 620.) *Metropolitan Bank v. Van Dyck*, 27 N. Y. Rep. 444. Where the power is given to Congress, it must judge of the means necessary to effect the end. The end must be legitimate. *Metropolitan Bank v. Van Dyck*, 27 N. Y. Rep. 445, 450; *The United States v. Marigold*, 9 How. 560. Under clause 4, and the power to coin money, Congress has the power to make the notes of the Government a legal tender. *Metropolitan Bank v. Van Dyck*, 27 N. Y. Rep. 454.

82, 83,
97-99.

This power was greatly assailed. See *Federalist*, 42, 43, 44; 1 *Elliot's Debates*, 293, 294, 300; 2 *Id.* 196, 342; Tuck. *Black.*

Com. Appendix, 286, 287; Hamilton on Banks, 1 Hamilton's Works, 287, 288. 121; McCulloch v. Maryland, 4 Wheat. 406, 407, 419; Calhoun's Essay on the Constitution; Story's Const. Ch. XXIV. § 1236-1258.

"POWER" is the ability or faculty of doing a thing; and employing the means necessary to its execution; the right to make laws; power? Story's Const. § 1237, 1241. 71, 93.

Powers given by the Constitution, imply the ordinary means of execution. (McCulloch v. Maryland, 4 Wheat. 409; 4 Elliot's Debates, 217-221.) Story's Const. 1237.

"Expressly delegated," was in the Articles of Confederation. 269. (Ante p. 9, Art. II). Story's Const. § 1238.

The plain import of the clause is, that Congress shall have all the incidental and instrumental powers necessary and proper to carry into execution all the express powers. It neither enlarges any power specifically granted, nor is it a grant of any new power to Congress. Story's Const. § 1243. Some have gone further than this. Governor Randolph, 2 Elliot's Debates, 342; Mr. Gerry in 1791, 4 Elliot's Debates, 225, 227. *Ex parte* Coupland, 26 Tex. 415, 416. What is the import of the clause?

The power must be *expressed*, or be an incident. Virginia Report and Resolutions, Jan. 1800, p. 33, 34; 1 Tuck. Black. Com. App. 287, 288; President Munroe's Exposition and Message, 4th May, 1822, p. 47.

The degree of necessity cannot control. 1 Hamilton's works, 118, 120.

"NECESSARY" often means no more than *needful, requisite, incidental, useful or conducive to*. Story's Const. § 1248. Define necessary?

The word "necessary" has no fixed character peculiar to itself, as in "*absolutely necessary* for executing its inspection laws," as contrasted with this *necessary and proper*, proves." Story's Const. § 1248-1250. See McCulloch v. Maryland, 4 Wheat. 413-418. 146-149, 162-164.

"PROPER" has a sense, admonitory and directory. It requires that the means should be *bona fide* appropriate to the end. proper? Define McCulloch v. Maryland, 4 Wheat. 419, 420; Story's Const. § 1253.

Among the necessarily incidental powers may be classed the right to acquire and govern territory; the right to contract and sue; to punish offenders on board ships; to protect collectors of revenue, men in the postal service, and army contractors. (Dugan v. The United States, 3 Wheat. 173, 179, 180; United States v. Tingey, 5 Peters, 115; United States v. Bevans, 3 Wheat. 388; The Exchange, 7 Cranch, 116; S. C., 2 Peters, 439; Osborn v. Bank of United States, 9 Wheat. 365, 366); Story's Const. § 1256-1258, and note 2. What may be classed among the incidental powers? 232-4.

The law must be necessary and proper. As to necessary, it must be borne in mind that no power can execute itself. * * The means are auxiliary powers * * ; that is implied powers. * * * * * 269.

But the law must also be proper as well as necessary. * * That is, even implied powers are subject to important conditions, when used as means to carry powers or rights into execution. * They must be carried into execution so as not to injure others; and

as connected with and subordinate to this, that where the implied powers or means used come in contact with the implied powers or means used by another, in the execution of the powers or rights vested in it, the less important should yield to the more important, the convenient to the useful, and both to health and safety; because it is proper they should do so. (Calhoun's Discourse on the Const.)

124. *Ex parte Coupland*, 26th Tex. 416, 417. The learned Judge also quotes to the same effect from *McCulloch v. Maryland*.

The question is not, whether or not the power to raise armies is granted; but whether to raise them by *conscription* is implied. (Mr. Munroe's plan in 1814 contrasted.) *Id.*

What is the inhibition as to the African slave trade?

SEC. IX.—[1.] The migration or importation of such persons as any of the States now existing shall think proper to admit, shall not be prohibited by the congress prior to the year one thousand eight hundred and eight; but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.

Define migration?

139. MIGRATION OR IMPORTATION OF PERSONS.—“Migration” here, doubtless, means *immigration*; but as connected with “importation,” it is used nearly synonymously with that term; and both have reference to the “PERSONS” who formed the basis of the African slave-trade. This trade was abolished on the 2d of March, 1807. 2 St. 428; 1 Brightly's Dig. 837. Those who wish to consult the statutes on this subject, and the luminous decisions upon a question now mostly obsolete in the United States, are referred to Brightly's Dig., chapter “SLAVE-TRADE,” vol. 1, p. 835, and notes thereon; Scott v. Sandford, 19 How. 397; 1 Kent's Com. Lect. 9, pp. 192–203; Cobb on Slavery; Story's Const. § 1331, 1334; 2 Pitk. History, ch. 20, pp. 261, 262; 2 Elliot's Debates, 335, 336; 3 Id. 97, 98, 250, 251; Federalist, 42.

This section has no application to the State governments. *Butler v. Hopper*, 1 Wash. C.C. 499.

Define person?

The word “PERSON” may fairly be said to refer to an imported African, and bears some analogy to the same word in Art. I., sec. 2, clause 3.

24, 35, 46.

Migration seems appropriately to apply to voluntary arrivals, as importation does to involuntary arrivals; and so far as an exception from a power proves its existence, this proves that the power to regulate commerce applies equally to the regulation of vessels employed in transporting men, who pass from place to place voluntarily, as to those who pass involuntarily. (*Gibbons v. Ogden*, 9 Wheat. 206–230.) Story's Const. 1387.

65–92.

When may the privilege of Habeas Corpus be suspended?

[2.] The privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

140. The PRIVILEGE of the writ must here mean the right to Define priv-
the writ. See Burrill's Law Dic., PRIVILEGE. ilege?

The power to issue the writ is not the privilege; to ask for it, is 141.
Attorney-General Bates on *Habeas Corpus*, 5th July, 1861.

This privilege the President may suspend in time of such a 189.
rebellion. Id. Only in the cases contemplated by the act of Con-
gress relative to rebellion. Id.

It results that the President is not obliged to answer a writ of Can the
habeas corpus. Id. He is not answerable to the judiciary as Presi- President
dent. Id. The courts cannot revise his political actions. Id. suspend it?
204.

141. HABEAS CORPUS—No doubt it means here to have the Define
body; or the writ then known as the *habeas corpus, ad faciendum, Habeas
subjiciendum, et recepiendum*, to do, submit to, and receive whatso- Corpus?
ever the judge or court awarding the writ shall adjudge in that 140.
behalf. 3 Bl. Com. 131; 2 Kent's Com. 22; Steph. Com. 135; Bur-
rill's Law Dic., HABEAS CORPUS; Story's Const. § 1339. These
authors give the several writs.

As a co-ordinate power of the government, the President could
not be made amenable to this writ, for military arrests made dur-
ing the rebellion. Id.

For the meaning of the term *Habeas Corpus* resort must be had Where must
to the common law; but the power to award the writ, by any of we look for
the courts of the United States, must be given by written law. the defini-
(Bollman, Swartwout's Case, 4 Cr. 93); Bates on *Habeas Corpus*;
Story's Const. § 1339. And the writ means the writ *ad subjicien-*
dum. (Luther v. Borden, 7 Howard, 1; Fleming v. Page, 9 How.
615; Cross v. Harrison, 10 How. 189; Santissima Trinidad, 7
Wheat. 305; Martin v. Mott, 12 Wheat. 29. Id.

It matters little whether it be called the peace or war
power. Id.

It is a writ of right, which every person is entitled to, *ex merito
justitie*. (4 Inst. 290.) 2 Kent's Com. Lect. XXIV. p. 26. This
lecture fully discusses the subject. And see Yates v. Lansing, 5
Johns. 282, and 6. Id. 387; Story's Const.

The writ was never suspended except by the act of 12th March, When was it
1863, 12 St. 755; 2 Brightly's Dig. 196; Story's Const. § 1342; first sus-
2 Jeff. Cor. 274, 291, 344. pended?

It would seem, as the power is given to Congress to suspend the
writ in cases of rebellion or invasion, that the right to judge, 140.
whether the exigency had arisen, must exclusively belong to that
body. (Martin v. Mott, 12 Wh. 19.) Story's Const. 1342. This
is denied in the opinion of Attorney-General Bates to President
Lincoln.

The federal courts have power to issue the writ of *habeas corpus* When may
only when necessary in aid of their jurisdiction, in a case pending. the Federal
Ex parte Everts, 7 Am. L. R. 79; overruling *United States v.* Courts issue
Williamson, 4 Id. 11. The case of a father claiming the custody of the writ?
an infant child, is not one in which a *habeas corpus* can issue, by a
court of the United States, as ancillary to the exercise of its juris-
diction. Id. Nor can a circuit court issue such a writ, although
the father be a citizen of another State, as the matter in dispute is
incapable of a pecuniary estimation. Id. A *habeas corpus* issued

by a State court has no authority within the limits of the sovereignty of the United States. If served on a marshal having a prisoner in custody, under authority of the United States, he should, by a proper return, make known the authority by which he holds him; but, at the same time, it is his duty not to obey the State process, but to execute that of the United States. *Ableman v. Booth*, 21 How. 506. The federal courts have power to apply the writ of *habeas corpus* to all cases which it would reach at common law; provided it be not issued to any person in jail, unless confined under and by color of the authority of the United States. *Ex parte Des Rochers*, 1 McAllister, 68. A State court, on a writ of *habeas corpus* issued at the relation of one committed on process from a federal court, cannot go behind the commitment and inquire into the grounds of it. *Williamson v. Lewis*, 18 Leg. Int. 172. The privilege of the writ of *habeas corpus* can only be suspended by act of Congress. *Ex parte Merryman*, 24 Law Rep. 78; 9 Am. L. R. 524; *Jones v. Seward*, 3 Gr. 431. But see *McQuillan's Case*, 9 Pittsburgh Leg. I. 27; 27 Law Rep. 129; and *Bates on Habeas Corpus*. The federal judges have exclusive jurisdiction on *habeas corpus*, whenever the applicant is illegally restrained of his liberty, under or by color of the authority of the United States, whether by virtue of a formal commitment or otherwise.

What is the power of the State Courts?

What department of the government only can suspend the writ?

What is the power of the State Courts over persons held in military service?

Ex parte McDonald, 9 Am. L. R. 662. Much diversity of opinion appears to exist, as to the power of the State courts to discharge, on *habeas corpus*, a person illegally held in the military service of the United States. Some judges hold that the State courts have jurisdiction to discharge one enlisted contrary to the acts of Congress. *Wilson's case*, 18 Leg. Int. 316; *Dobb's Case*, 9 Am. L. R. 565; *Commonwealth v. Carter*, 20 Leg. Int. 21; *Henderson's Case*, Id. 181; *Webb's Case*, 10 Pittsburgh Leg. I. 106; *contra*, *Phelan's Case*, 9 Abbott, 236. And in *Carney's Case*, Chief-Justice Lowrie discharged a person from military arrest, who, after having been exempted from the conscription by the board of enrolment, was arrested on the pretext that they had reconsidered their decision. 14th August, 1863, MS. On the contrary, it has been held that the State courts have no jurisdiction to inquire into the validity of the draft on *habeas corpus*. *Spangler's Case*, 11 Am. L. R. 596; *Jordan's Case*, Id. 749. And that they have no power to discharge from the custody of the provost marshal one held for desertion, though enlisted contrary to law. *Shirk's Case*, 3 Gr. 460. This, however, was said by Leonard, J., in the Supreme Court of New York, to be founded on a misconception of the case of *Ableman v. Booth*; and Barrett, having been illegally enlisted, was discharged, notwithstanding a charge of desertion. *Barrett's Case*, 12 Pittsburgh Leg. I. 90. See also *Follis's Case*, 19 Leg. Int. 276; *United States v. Wright*, 20 Id. 21; *McCall's Case*, Id. 108; *Commonwealth v. Rogers*, 10 Pittsburgh Leg. I. 178; *Stevens's Case*, 24 Law Rep. 205; *Ex parte McDonald*, 9 Am. L. R. 662; *United States v. Taylor*, 20 Leg. Int. 284; *In re Hicks and Archibald*, 11 Pittsburgh Leg. I. 25; *Com. v. Wright*, 3 Gr. 437.

In *Vallandigham's Case*, Judge Leavitt refused an application for a writ of *habeas corpus*, on the ground that the imprison-

ment was under military authority, and that, although a civilian, he was held for trial before a military commission, for disloyal practices; the country being engaged in war, and the military necessities requiring that the power to arrest parties under such circumstances should be exercised by the President, as commander-in-chief. Vallandigham's Trial, 259. Where a prisoner is held on original federal (not judicial) process, the State courts have concurrent jurisdiction with those of the United States, to inquire into the legality of the detention on *habeas corpus*. Bressler's Case, 3 Gr. 447; citing 10 Johns. 328; 7 Cow. 471; 5 Hill, 16; 2 South, 555; 12 N. H. 194; 11 Mass. 63; 24 Pick. 267; 7 Cush. 285; 7 Barr. 336. The State judges have no power, on *habeas corpus*, to inquire into cases of commitment or detainer, under the authority of the federal government. Hopson's Case, 12 Am. L. R. 189. A return to a *habeas corpus*, by a provost marshal, that the prisoner is held as a deserter from the army, under the authority of the United States, is sufficient, without the production of the body; the State courts having no jurisdiction to inquire into the truth of the fact alleged in the return. *Id.* The proceedings on a writ of *habeas corpus* in the federal courts, are governed by the common law of England as it stood at the adoption of the Constitution, subject to such alterations as Congress may prescribe. *Ex parte* Kaine, 3 Blatch. 1. See *Ex parte* Aernam, *Id.* 160.

By the act of 3d March, 1863, § 1, 12 Stat. 755 (2 Brightly, 196), it is declared:—"During the present rebellion, the President of the United States, whenever, in his judgment, the public safety may require it, is authorized to suspend the writ of *habeas corpus* in any case throughout the United States, or any part thereof."

And when held by the military power?
Give the date and the language of the act to suspend the writ?

Upon a return to a writ of *habeas corpus*, that the relator was held by virtue of an order issued by the Secretary of War, by direction of the President, for endeavoring to prevent, and discouraging enlistments in the army, and that the privilege of the writ of *habeas corpus* had been suspended by the President, the writ was dismissed without inquiry into the validity of the arrest, or the legality of the cause of complaint. *Kulp v. Ricketts*, 3 Gr. 420. And see Vallandigham's Trial, 259.

On the 15th September, 1863, the President, by proclamation, suspended the privilege of the writ of *habeas corpus*, during the rebellion, throughout the United States, in all "cases when, by the authority of the President of the United States, the military, naval, and civil officers of the United States, or any of them, hold persons under their command or in their custody, either as prisoners of war, spies, or aiders or abettors of the enemy, or officers, soldiers, or seamen, enrolled, drafted, or mustered or enlisted in or belonging to the land or naval forces of the United States, or as deserters therefrom, or otherwise amenable to military law, or the rules and articles of war, or the rules or regulations prescribed for the military or naval service by authority of the President of the United States, or for resisting a draft, or for any other offense against the military or naval service." In *Commonwealth ex rel. Cozzens v. Frink*, on *habeas corpus*, before Judge Thompson of the Supreme Court of

And the President's proclamation?

Evidence. Pennsylvania, it was decided, that the courts will take judicial notice that the rebellion no longer continues, and with it ends the power of the President to suspend the *habeas corpus*, and to order the arrest of a citizen, without warrant, if any he ever possessed, by virtue of this act. In that case, a provost-marshal made return to a writ of *habeas corpus*, that the relator was detained by him as a prisoner, under the authority of the President of the United States; this return, however, was adjudged insufficient, and the prisoner was discharged from military arrest. Philadelphia "Ledger," 6th July, 1865. 13 Am. L. R. 700.

Mrs. Surratt's case? In Mrs. Surratt's Case, Judge Wylie, of the Supreme Court of the District of Columbia, issued a writ of *habeas corpus* to inquire into the legality of her conviction by a military commission; but was compelled to acknowledge himself powerless to enforce obedience to the writ, and the prisoner was executed in pursuance of the sentence. 7th July, 1865.

See 2 Brightly's Dig. title *Habeas Corpus*, 140, 141. Mr. Brightly also refers to the pamphlet of Horace Binney, against the constitutionality of the act.

But see Attorney-General Bates on *Habeas Corpus*, 5th July, 1861.

What is the jurisdiction of the Supreme Court of the United States? The circuit court may certify a proceeding for a *habeas corpus*, upon a division of opinion, as in other "causes" or "suits." (Bollman's Case, 4 Cranch, 75; case of Tobias Watkins, 3 Pet. 193; The United States v. Daniel, 6 Wheat. 562; Weston v. The City Council of Charleston, 2 Pet. 449; Cohens v. Virginia, 6 Wheat. 264; Holmes v. Jennison, 14 Pet. 540.) *Ex parte* Milligan, 4 Wallace, 110-113, 117.

199-201.

396.

If a party is unlawfully imprisoned, the writ of *habeas corpus* is his appropriate legal remedy. It is his *suit* in a court to recover his liberty. (Holmes v. Jennison, 14 Pet. 540.) *Ex parte* Milligan, 4 Wallace, 113, 132.

The act of Congress "relating to *habeas corpus* and regulating proceedings in certain cases," was approved March 3d, 1863. (12 St. 755.) *Ex parte* Milligan, 4 Wallace, 114. This act was constitutional. *Id.* 133.

The President suspended the writ by proclamation, dated 15th September, 1863. *Id.*

Does the suspension authorize arrests?

The suspension of the writ does not authorize the arrest of any person, but simply denies to one arrested the privilege of this writ in order to obtain his liberty. *Ex parte* Milligan, 4 Wallace, 115. The act recited. *Id.* The Chief-Justice and Justices Wayne, Swayne and Miller dissented from this. *Id.* 137.

The suspension of the privilege of the writ of *habeas corpus* does not suspend the writ itself. It issues as a matter of course, and on the return made to it, the court decides whether the party applying is denied the right of proceeding any further with it. *Id.* 131.

When will it live in contempt cases?

The supreme court will not grant the writ to bring up a party imprisoned for contempt, except on a certificate of division of opinion, because such a commitment is a criminal proceeding. *Ex parte* Kearney, 7 Wheat. 38; Anderson v. Dunn, 6 Wheat. 204; Sergeant's Constitutional Law, 66, 67; James Buchanan, Peck's Trial, 435.

The laws of Pennsylvania in relation to the writ of *Habeas Corpus* reviewed. Opinion of Attorney-General, Henry Stanbery in Gormley's case, 6th Oct., 1867. And also the several acts of Congress of 1789, 1833, 1842, and 1863, upon the subject of *Habeas Corpus*. None of these acts declare the jurisdiction of the courts of the United States to be exclusive of the State courts. 12 Op. 258

When for persons enlisted in the navy?

From an examination of the acts of 1789, 1806, 1809, 1820, 1837, 1845, and July 1, 1864, it appears that minors between the ages of thirteen and eighteen may be enlisted in the navy with the consent of their parents or guardians, to serve until the age of twenty-one years; and that minors above eighteen years may be enlisted without such consent. 12 Op. 258.

The weight of authority is in favor of the power of the State courts to hear the application of enlisted persons or persons held by United States authority, and to discharge or remand them. Id. The production of the body is the life of the writ. 12 Op. 258.

But judicial convictions and sentences by the United States courts are exceptions to the rule.

Neither the regularity nor validity of the proceedings can be called in question by any other court, State or Federal, by *habeas corpus*. (*Ableman v. Booth*, 21 How. 506, 526.) Stanbery's opinion in Gormley's Case. 12 Op. 258.

"We do not question the authority of a State court or judge, who is authorized by the laws of the State to issue the writ of *habeas corpus*, to issue it in any case where the party is imprisoned within its territorial limits, provided it does not appear when the application is made, that the person imprisoned is in custody under authority of the United States. The court or judge has a right to inquire into this mode of proceeding for what cause and by what authority the prisoner is confined within the territorial limits of the State sovereignty. And it is the duty of the marshal or other person having the custody of the prisoner, to make known to the judge or court, by a proper return, the authority by which he holds him in custody. This right to inquire, by means of *habeas corpus*, and the duty of the officer to make a return, grows necessarily out of the complex character of our government, and the existence of two distinct and separate sovereignties within the same territorial space, each of them restricted, in its power, and each, within its own sphere of action, prescribed by the Constitution of the United States, independent of the other. But after the return is made, and the State judge or court judicially apprised that the party is in custody under the authority of the United States, they can proceed no further. They then know that the prisoner is within the dominion and under the jurisdiction of another government, and that neither the writ of *habeas corpus* or any other process issued under State authority can pass over the line of division between the two sovereignties. He is then within the dominion and exclusive jurisdiction of the United States. If he has committed an offense against their laws, they alone can punish him. If he is wrongfully imprisoned, their tribunals can release him and afford him redress. And although, as we have said, it is the duty of the marshal, or other person holding him, to make known by a proper return the authority under which he detains

Define the demarcation between the powers of United States and State Courts?

Stanberry. him, it is at the same time imperatively his duty to obey the process of the United States, to hold the person in custody under it, and to refuse obedience to the marshal or process of any other government. And, consequently, it is his duty not to take the prisoner, or suffer him to be taken, before a State judge, or court, upon a *habeas corpus* under State authority. No State judge or court, after they are judicially informed that the party is imprisoned under the authority of the United States, has any authority to interfere with him or to require him to be brought before them. And if the authority of a State, under form of judicial process or otherwise, should attempt to control the marshal or other authorized officer or agent of the United States in any respect, in the custody of his prisoner, it would be his duty to resist it and call to his aid any force that might be necessary to maintain the authority of the law against illegal interference. No judicial process, whatever form it may assume, can have any authority outside of the limits of the jurisdiction of the court or judge by whom it is issued ; and an attempt to enforce it beyond these boundaries is nothing less than lawless violation. (United States v. Booth, 21 How. 526?") Stanbery in Gormley's Case, 12 Op. 267; 1 Kent's Com. 32, 11th Edition, note 1.

This general language is to be confined to process issued by the United States courts, not to any other kind of imprisonment. (Hurd on *Habeas Corpus*, 284.) Stanberry.

295. It was the duty of Commodore Selfridge to produce the body of the marine. *Id.* The decision of the Secretary of the Navy was revoked, and the Commodore ordered to obey the writ of the Court of Quarter Sessions of Pennsylvania. New York Herald of 7th Oct., 1867.

Attainder
and *ex post
facto*?

[3.] No bill of attainder or *ex post facto* law shall be passed.

Define Bill
of Attain-
der?

142. A BILL OF ATTAINDER is a legislative act which inflicts punishment without a legal trial. And it includes bills of pains and penalties. (Story's Const. § 1344.) Cummings v. The State of Missouri, 4 Wallace, 323. They may be directed against individuals or a whole class. *Id.* And inflict punishment absolutely or conditionally. *Id.* Gaines v. Buford, 1 Dana, 510.

Give exam-
ple of such?

19.

The Constitution of Missouri, which required an expurgatory oath of all priests, teachers, &c., was in effect, a bill of attainder. Cummings v. State of Missouri, 4 Wall 323, 325.

The test oath required of Attorneys (note 242) of the courts of the United States, partakes of the nature of a bill of pains and penalties, and it is subject to the constitutional inhibition against the passage of bills of attainder, under which general designation they are included. *Ex parte* Garland, 4 Wallace, 377; H. Stanberry's Opinion of 24th May, 1867, p. 14.

In Cummings v. The State, (4 Wallace, 326), we considered the meaning of a bill of attainder and of an *ex post facto* law in the clause of the Constitution forbidding their passage by the States, and it is unnecessary to repeat here what we there said. A like

prohibition is contained in the Constitution against enactments of *Ex post facto*. this kind by Congress. *Ex parte* Garland, 4 Wallace, 378.

Attorneys and counsellors are not officers of the United States. *Id.* They are officers of the court, and hold during good behavior, and can only be deprived of their offices for misconduct ascertained and declared by the judgment of the court, after opportunity to be heard has been afforded. (*Ex parte* Heyfron, 7 Howard, Mississippi, 127; *Fletcher v. Dangerfield*, 20 California, 430.) *Id.* Are attorneys officers?

Their appointments and removal are judicial acts, and they can only be deprived of the right for moral and professional delinquency. (In the matter of the application of Henry W. Cooper, 22 New York (8 Smith), 81; *Ex parte* Secombe, 19 How. 9.) *Ex parte* Garland, 4 Wallace, 379. The removal cannot be effected by an act of Congress requiring new qualifications. (*Cummings v. Missouri*, 4 Wallace, 329.) *Ex parte* Garland, 4 Wallace, 380. Such laws are forbidden both to Congress and the States. *Id.* 386.

In the opinion by Mr. Justice Miller, expressing the dissent of Chief-Justice Chase, Justices Davis, Swayne, and himself, he defines "ATTAINDER," in the language of Sir Thomas Tomlins, as "the stain or corruption of blood of a criminal capitally condemned; the immediate and inseparable consequence of the common law, on the pronouncing the sentence of death." *Ex parte* Garland, 4 Wallace, 387. What was the dissent?

Bills or acts of attainder were laws which declared certain persons attainted, and their blood corrupted, so that it had lost all heritable quality. *Ex parte* Garland, 4 Wall. 387.

The power to pass attainders is forbidden in this section to Congress, in section nine to the States, and in section three of article III., it is declared that no attainder of treason shall work corruption of blood or forfeiture, except during the life of the person attainted. *Ex parte* Garland, 4 Wallace, 387, 388. Is the power forbidden to States? 159.

Attainders were convictions and sentences pronounced by the legislative department, instead of the judicial; the sentence pronounced and the punishment inflicted were determined by no previous law or fixed rule; the investigation into the guilt of the accused, if any were made, was not necessarily or generally conducted in his presence, or that of the counsel; and no recognized rule of evidence governed the inquiry. (Story's Const. § 1344.) *Ex parte* Garland, 4 Wallace, 389. (A bill of attainder may affect the life of an individual, or may confiscate his property, or both. *Fletcher v. Peck*, 6 Cr. 138; 1 Kent's Com. Lect. 19, p. 382.) Define attainders at common law?

The act of Congress and the Constitution of Missouri, requiring expurgatory oaths, do not come within the definitions, and are not bills of attainder. *Ex parte* Garland, 4 Wallace, 388. 18.
143.

They designate no criminal, either by name or description, declare no guilt, pronounce no sentence and inflict no punishment, and can, in no sense, be bills of attainder. Justice Miller in *ex parte* Garland, 4 Wallace, 390. See 2 Woodeson's Lectures, 622-624.

143. *Ex post facto* laws are such as create or aggravate crime, or increase the punishment, or change the rules of evidence for the purpose of conviction. *Calder v. Bull*, 3 Dall. 390; *Cummings v.* Define *ex post facto*? 398.

Cases.

156.

Missouri, 4 Wallace, 326; *Shepherd v. People*, 25 N. Y. 406. The phrase only applies to penal and criminal laws, which inflict forfeitures or punishment, and not to civil proceedings which affect private rights retrospectively. *Watson v. Mercer*, 8 Pet. 110; *Carpenter v. Pennsylvania*, 17 How. 463; *Fletcher v. Peck*, 6 Cr. 138; *Society for the Propagation of the Gospel v. Wheeler*, 2 Gall. 138; *United States v. Hall*, 2 Wash. C. C. 366; *Commonwealth v. Lewis*, 6 Binn. 271; *Locke v. New Orleans*, 4 Wallace, 173. There is nothing in the Constitution which forbids Congress to pass laws violating the obligation of contracts, though such a power is denied to the States. *Evans v. Eaton*, Pet. C. C. 323; *Mayer v. Knight*, 27 Tex. 719; *Paschal's Annotated Digest*, note 220, p. 91, and note 157, p. 42.

Give an example?

18.
122.

An *ex post facto* law renders an act punishable in a manner it was not punishable when committed. (*Fletcher v. Peck*, 6 Cranch, 138.) *Cummings v. Missouri*, 4 Wallace, 326. An act repealing a law on which a grant rests and annulling the title, is, in effect, an *ex post facto* law. *Idem*. The Constitution of Missouri, which disqualified all persons who had aided in the rebellion or sympathized with the rebels, unless they took an expurgatory oath, was in effect an *ex post facto* law. *Cummings v. Missouri*, 4 Wallace, 327.

Some of the things enumerated in the oath were not offenses when committed; and therefore are within the definition of an *ex post facto* law. "They impose a punishment for an act not punishable at the time it was committed." *Id.* So the clauses which imposed a further penalty was *ex post facto*, because "they impose additional punishment to that prescribed when the act was committed." (*Fletcher v. Peck*, 6 Cranch, 138.) *Cummings v. Missouri*, 4 Wallace, 328. (For the Missouri oath, see Constitution of Missouri, Article II., 1 New York Convention Manual, p. 348.)

This provision to secure the liberty of the citizen, cannot be evaded by the form in which the power of the State is exerted. *Id.*

To what class of cases does *ex post facto* only apply?

159.

In the cases of *Cummings* and *Garland*, Mr. Justice Miller delivered the dissentient opinion for Chief-Justice Chase, Justices Davis, Swayne, and himself. He held that all the cases agree, that the term *ex post facto* is to be applied to criminal and penal cases alone, and not to civil proceedings. (*Watson v. Mercer*, 8 Pet. 88; *Calder v. Bull*, 3 Dall. 386; *Fletcher v. Peck*, 6 Cr. 87; *Ogden v. Saunders*, 12 Wheat. 266; *Satterlee v. Matthewson*, 2 Pet. 380.) *Ex parte Garland*, 4 Wallace, 390, 391.

233.

They make acts done before the passage of the law, and which were innocent when done, criminal, and punish such actions; or change the punishment and inflict greater punishment than the law annexes to the crime when committed; or they alter the rules of evidence and receive less or different testimony than the law required at the time of the commission of the offense. (*Calder v. Bull*, 3 Dall. 386.) *Ex parte Garland*, 4 Wall. 391; *Cummings v. Missouri*, 4 Wall. 325, 326; *Shepherd v. People*, 25 N. Y. (11 Smith) 406.

158.

The true distinction, is between *ex post facto* laws and retrospective laws. (*Calder v. Bull*.) *Ex parte Garland*, 4 Wallace, 391.

The minority held that the test oath to attorneys in the act of

Congress, and the expurgatory oath in the Constitution of Missouri Oath. are not within the definition of an *ex post facto* law. Id.

And for further learning on the subject, see *Carpenter v. Pennsylvania*, 17 How. 456; *Baughner v. Nelson*, 9 Gill. 299; *The Federalist*, Nos. 44, 49; *Journal of Convention*, Supp. 431; 2 *Am. Museum*, 556; 2 *Elliot's Debates*, 343-354; *Ogden v. Saunders*, 12 Wheat. 266, 303, 329, 330, 335; 1 *Kent's Com. Lect.* 19, pp. 381, 382.

[4.] No capitation, or other direct tax, shall be laid, unless in proportion to the *census* or enumeration here- inbefore directed to be taken. What is the inhibition as to direct taxes?

144. "CAPITATION," [Lat. caput, the head] or, as they are more commonly called, poll-taxes, that is taxes upon the polls, heads, or persons, of the contributors, are direct taxes. (See *Smith's Wealth of Nations*, B. 5, ch. 2, art. 4; *The Federalist*, No. 36; 2 *Elliot's Debates*, 209.) *Story's Const.* § 954; *Hylton v. United States* 3 Dall. 171; *Loughborough v. Blake*, 5 Wh. 320-1. This section, compared with the 8th and 9th, and the 2d section of the 1st art. *Hylton v. United States*, 1 Cond. 84. A tax on carriages, expenses, or income is not a direct tax. Id. Define capitation?

Taxes on lands, houses, &c., are direct taxes. (1 *Tucker's Black. Com. App.* 232, 233; *Hylton v. United States*, 3 Dall. 171; *The Federalist*, No. 21; *Loughborough v. Blake*, 5 Wheat. 317-325.) *Story's Const.* § 954. The poll-tax was to be considered direct on account of the slaves. Id.

In a general sense, all contributions imposed by the government upon individuals for the service of the State, are called taxes, by whatever name they may be known, whether by the name of tribute, tithe, tailage, impost, duty, gabel, custom, subsidy, aid, supply, excise, or other name. They are divided into direct and indirect taxes. Under the former are included taxes on land, or other real property; under the latter, taxes on articles of consumption. (*Federalist*, Nos. 21, 36; *Smith's Wealth of Nations*; B. 5, ch. 2, Pt. 2, Arts. 1 and 2 and App.; *Loughborough v. Blake*, 5 Wheat. 317-319.) *Story's Const.* § 950. What are all contributions imposed by government called?

If South Carolina considers the revenue laws unconstitutional, and has a right to prevent their execution in the port of Charleston, there would be a clear constitutional objection to their collection in every port, and no revenue could be collected anywhere; for all imposts must be equal. President Jackson's Proclamation, 10th December, 1832; *Story's Const.* § 1053a, note 1. It will also be found in Benton's Thirty Years in the Senate. No document has ever more strongly stated the principles upon which the government suppressed the rebellion. What was the view of nullification?

For an exhaustive treatise on "TAXES," see *Story's Const.* 3 ed. book 3, ch. IV.

Direct taxes must be by the rule of apportionment. *The License Cases*, 5 Wall. 471. 22, 81.

Define
census?

145. "CENSUS."—Lat. in the Roman law. A numbering or enrollment of the people, with a valuation of their fortunes (*personarum et bonorum descriptio*). (Brissonius.) The right of being enrolled in the census books. (Butler's Corpus Jur. 27.) [Law Lat.] In old European law, a tax or tribute (*tributum*); a toll (*Esprit des lois*, liv. 30, c. 14). Burrill's Law Dic., CENSUS.

21, 22.

In this clause it doubtless has reference to Article 1, clause 3, which declares that "Representatives and direct taxes shall be apportioned among the several States which may be included in the Union according to their respective *numbers*," the basis of which, as has been seen, was to number every soul, but to exclude two-fifths of the slaves from the ratio of representation. But since the destruction of slavery, all the "*numbers*" found by the future censuses must be counted, unless the new basis proposed by the fourteenth amendment shall have been adopted. This has naturally been one of the great points of controversy upon the reconstruction question. It is a legitimate fruit of the revolution.

24.
275, 285.

How many
census re-
ports?

To the philosophical statesman there has been nothing in the execution of the Constitution so valuable as the Census Reports and the Compendiums thereof, running through eight decades. The information and the classification have improved every year, until the present able head of the bureau has almost reduced the tables to perfection. Nothing is hazarded in saying that, had these reports been carefully studied, the Union never would have encountered its severe struggle.

What are the
inhibitions
as to com-
merce?

[5.] No tax or duty shall be laid on articles exported from any State. [6.] No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another; nor shall vessels bound to, or from, one State, be obliged to enter, clear, or pay duties in another.

144.

61.

Can there be
any duty on
exports?

146. "NO TAX OR DUTY."—The power is thus wholly taken away to interfere with the subject of exports. Story's Const. § 1014; Sergeant's Const. ch. 28, p. 346; Rawle's Const. ch. 10, p. 115, 116; United States v. Brig William, 2 Hall's Law Jour. 255, 259, 260. The subject was well considered in the Convention. Journals of Convention, 222, 275, 301, 318, 377; 2 Curtis's Hist. Const. 290, 304.

The clause was stricken out of the Constitution of the Confederate States. This clause read: "No preference shall be given by any regulation of commerce to the ports of one State over those of another."

And very heavy export duties were levied upon cotton, first by military orders, and afterward by statute. Paschal's Annotated Digest, p. 90, § 7.

The omission in regard to vessels was to correspond with their amendment in regard to commerce.

147. "NO PREFERENCE."—[Lat. *prefero*, the act of preferring.]

—This means, that “all duties, imports and excises, shall be uniform throughout the United States.” See Story’s Const. § 1016-1031, 3d edition and notes; Journals of the Convention, 227, 303, 304; Federalist, No. 44. What means preference? 81.

An “IMPOST,” or duty on imports, is a custom or tax levied on articles brought into a country. “IMPORTS,” are the articles themselves which are brought into the country. “A DUTY ON IMPORTS” is not merely a duty on the act of importation, but it is a duty on the thing imported. (Brown v. Maryland, 12 Wheat. 449.) Story’s Const. § 1013-1031, 1072*a*-1072*i*, note 3. Define import? 75-77.

The power of the State inspection laws is retained, subject to the revision and control of Congress. (Gibbons v. Ogden, 9 Wheat. 203-206, 210, 235, 236, 311; Brown v. Maryland, 12 Wheat. 419, 438, 439, 440.) Story’s Const. § 1016, 1017; Curtis’s Hist. Const. 189, 281, 282, 285, 290-297. Where is the power of inspection? 77-81.

Inspection laws form a portion of the immense mass of legislation, which embraces every thing in the territory of a State not surrendered to the general government. Inspection laws, quarantine laws, and health laws, as well as laws for regulating the internal commerce of a State, and others, which respect roads, fences, &c., are component parts of State legislation, resulting from the residuary powers of State sovereignty. No direct power over these is given to Congress, and, consequently, they remain subject to State legislation, though they may be controlled by Congress when they interfere with their acknowledged powers. (See the authorities above cited; Federalist, Nos. 7, 22; Gibbons v. Ogden, 9 Wheat. 199-201.) 269.

148. “VESSELS BOUND.”—This clause has reference to the coasting trade, and the intercommunication by lakes, bays, rivers, and creeks—a trade, the tonnage of which exceeds all our foreign tonnage by over a thousand *per cent*. The vastness of this commerce and its total exemption from taxation, show the immense value of the Union. Define vessels bound?

A State law requiring the payment of pilotage fees, does not infringe this clause. Cooley v. Board of Wardens, 12 How. 314-15; Pennsylvania v. Wheeling & Belmont Bridge Co. 18 Id. 421.

[7.] No money shall be drawn from the treasury, but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money, shall be published from time to time. What are the restrictions over the treasury?

149. “NO MONEY,” &c.—The definition of money here, is sufficiently comprehensive to embrace every kind of currency received and expended by the government. What means money here? 82-84, 98, 99.

The Confederate States Constitution contained this further restriction: “Congress shall appropriate no money from the Treasury, except by a vote of two-thirds of both houses, taken by yeas and nays, unless it be asked and estimated for by some one of the heads of departments, and submitted to Congress by the President;” How did the Confederate States Constitution vary?

Money.

or for the purpose of paying its own expenses and contingencies; or for the payment of claims against the Confederate States, the justice of which shall have been judicially declared by a tribunal for the investigation of claims against the government, which it is hereby made the duty of Congress to establish." Paschal's Annotated Digest, pp. 90, 91. As it was contemplated that the cabinet officers should have seats upon the floor, with the privilege of discussion; and as "the President may approve any appropriation, and disapprove any other appropriation in the same bill," this was certainly a great increase of executive power. A bill not estimated for had to receive a two-thirds vote, then encounter opposition by the head of department on the floor; and finally pass by a two-thirds vote over the President's veto. Paschal's Annotated Digest, pp. 87, 88, Art. I., § 6, 7, Clauses, 2, 2.

A court of claims was created by the act of 24th Feb., 1855; but the final power to allow or disallow the judgment of the court, still remains. 9 St. 612; 1 Brightly's Digest, 198.

What is the creditor's remedy?

Whether the public moneys at the disposal of the postmaster-general, are technically in the treasury or not, the spirit of this provision applies to them, and ought to be faithfully observed in their expenditure. 3 Opin. 13. No other remedy exists for a creditor to the government, than an application to Congress for payment; he cannot have a lien on the public property in his possession or custody. *United States v. Barney*, 3 Hall's L. J. 130; 2 Wh. Cr. Cas. 513.

The reports of the receipts and expenditures are made to Congress annually, by the Secretary of the Treasury; and they form an important part of the executive documents of the nation.

What are the inhibitions as to nobility and presents?

[8.] No title of nobility shall be granted by the United States; and no person holding any office of profit or trust under them, shall, without the consent of the Congress, accept of any present, emolument, office, or title of any kind whatever, from any king, prince, or foreign state.

Define nobility?

150. "NO TITLE OF NOBILITY."—[*Lat. Nobilitas*.]—Being noble, whether by antiquity of family, or letters patent by the sovereign Worcester's Dic., NOBILITY.—Here, the collective body of titled and privileged persons in a State; the aristocratic and patrician class; the peerage; as the English *nobility*, the French, German, Russian nobility. Webster's Dic., NOBILITY; 1 Black. Com. 156–157.

152.

Perfect equality is the basis of all our institutions. Story's Const. § 1351. A privileged order would certainly destroy our republican form of government. (See sec. X). The same restriction is upon the States. *Id.*

Define office?

151. "NO PERSON HOLDING ANY OFFICE."—OFFICE. [*Lat. Officium*, or *opificium*; from *opus*, work, and *facio*, to do.] Here a public charge or employment. Worcester's Dic., OFFICE.—Thus a mar-

shal of the United States, cannot at the same time, hold the office Money.
of commercial agent of France. 6 Op. 409.

As to the object, see the Federalist (No. 84; 1 Tuck. Black) Com.
App. 295–296; Rawle on the Const. ch. 10, p. 120; Story's Const.
§ 1352. An amendment was proposed in 1803, extending the
prohibition to all private citizens. But it has never yet been rati-
fied. Story's Const. § 1352.

SEC. X. [1.] No State shall enter into any treaty, What are the
alliance, or confederation; grant letters of marque and unqualified
reprisal; coin money; emit bills of credit; make any inhibitions
thing but gold and silver coin a tender in payment of upon the
debts; pass any bill of attainder, *ex post facto* law, or State?
law impairing the obligation of contracts, or grant any
title of nobility.

152. REMARK.—It will be observed that to Congress is either Which of
given or denied all the powers herein inhibited to the States ex- these powers
cept "to make anything but gold and silver coin a tender," "emit are given or
bills of credit," or "pass any law impairing the obligation of con- denied to
tracts." Thus to the President, by and with the advice of the the United
Senate, is given the right to enter into treaties, alliances, or confed- States?
erations. To Congress is given the right to coin money and grant 178.
letters of marque and reprisal; and from Congress is denied the 97, 98.
power to create a title of nobility or pass *ex post facto* laws. About 99, 178.
the power of Congress to emit bills of credit, make tenders in pay- 150.
ment of debts, or to pass laws impairing the obligation of contracts, 153.
the Constitution is silent. Neither of these powers is reserved to
the States under the tenth amendment; for they are expressly pro-
hibited. Those who deny them to Congress do so upon the ground, 269.
that because they are denied to the States and not granted to Con-
gress, they do not exist in either government. But on the other
hand, it is answered, that the right to borrow money on the credit
of the United States carries the right to emit bills of credit and to 78, 82.
make them lawful tenders; and, as *ex post facto* laws relate to 143, 156.
crimes, the power to pass bankrupt laws carries along the power
to impair the obligation of contracts by the Federal Government. 94–96.
The whole ground is narrow; and hence we have to be controlled
by the precedents of the past and what is necessary and proper.
None deny the concurrent power of Congress to make gold and
silver coin a tender in payment of debts. But the argument is
that it can make nothing else a lawful tender.

153. TO ENTER INTO ANY TREATY, &C., TO "COIN MONEY."— Why are
These powers being national cannot exist in the States. Federal- national
ist, No. 44; Rawle's Const. ch. 10, p. 136. They belonged to the Con- powers de-
federation, *ante*, p. 11, Art. 6. The same remark is true as to letters nied?
of marque and reprisal and coining money. Story's Const. § 178, 195.
1354–1357.

154. EMIT BILLS OF CREDIT.—To constitute a bill of credit, Define a bill
within the Constitution, it must be issued by a State, involve the of credit?

400. faith of the State, and be designed to circulate as money, on the credit of the State, in the ordinary uses of business. *Briscoe v. Bank of Kentucky*, 11 Pet. 257, 311; *Woodruff v. Trapnall*, 10 How. 204. As to what are such bills of credit, see *Craig v. Missouri*, 4 Pet. 410, 434-448; same case, 8 Pet. 40; *Woodruff v. Trapnall*, 10 How. 205; *McFarland v. The Bank of Arkansas*, 4 Ark. 410; *Darrington v. State Bank of Alabama*, 13 How. 12; *Curran v. Arkansas*, 15 How. 317-18. The loan certificates of Missouri were bills of credit, and formed no valid consideration for a contract. *Mankster v. The State*, 1 Mo. 321; *Lopez v. The State*, 1 Mo. 451; *Craig v. Missouri*, 4 Pet. 410, 435. And see *State of Indiana v. Warm*, 6 Hill, 33; *Delafield v. State of Illinois*, 26 Wend., 192; *Sturges v. Crowinshield*, 4 Wheat. 204-205; *Madison's Letter to C. J. Ingersol*, 2d Feb. 1811. *Story's Const.* § 1358-1373.

Bills of credit in the colonies were understood to apply to all paper money, whether funds were provided for their repayment or not. (See 2 *Hutch. Hist.* 208, 381.) *Story's Const.* § 1368. This author and the cases cited exhaust the whole learning upon the subject.

"Emit bills of credit," was omitted in the Constitution of the Confederate States. The result was that many of the States issued large amounts of bills intended to circulate as money. *Paschal's Annotated Digest*, p. 91, Arts. 806-811.

Where does the power as to legal tenders reside? **155.** "MAKE ANY THING BUT GOLD AND SILVER COIN A TENDER IN PAYMENT OF DEBTS."—The things in this article, not also prohibited to Congress, are allowed to be exercised by it, if the power come within the purview of either of the express or implied powers granted. *Metropolitan Bank v. Van Dyck*, 27 N. Y. Rep. 418, 423, 442.

269. "The interpretation which I give to this clause is, that the United States possess power to make any thing besides gold and silver a legal tender. * * They have a right to make bank paper a legal tender. Much more then, have they the power of causing it to be received by themselves in payment of taxes." (4 *Elliot's Debates*, 367, 368; *Mr. Alston of South Carolina*.) *Metropolitan Bank v. Van Dyck*, 27 N. Y. R. 418; *The Pennsylvania Cases*, 52 Penn. St. R. (2 Smith) 1-100.
- 83, 97, 98.

What may be a legal tender? There is no express delegation of power to Congress to legislate on the subject of legal tenders, neither is there any prohibition in the Constitution, upon Congress forbidding such legislation, or declaring what shall or shall not make a legal tender; the omission was not accidental. *Metropolitan Bank v. Van Dyck*, 27 N. Y. 422.

It was the opinion of Mr. Madison, that Congress would have the power to declare bills or notes issued on the credit of the United States, a legal tender, unless prohibited by the Constitution. *Metropolitan Bank v. Van Dyck*, 27 N. Y. 419, 420, 422, 423, 426.

83. The first legal tender act was in favor of foreign coin. (Act 1st July, 1793.) *Metropolitan Bank v. Van Dyck*, 27 N. Y. 424, where are cited all the acts on the subject.

A contract dated 16th December, 1851, payable "in gold or silver

coin, lawful money of the United States," may be paid in United States legal tender notes, as lawful money of the United States. *Rodes v. Bronson*, 34 N. Y. R. 649. When the contract matured, it was payable in the only lawful money of the country. The power 88, 97-99. of Congress to declare treasury notes legal tenders for debts contracted previously to its passage, as well as those contracted subsequently, has been affirmed by this court. (*Metropolitan Bank v. Van Dyck*, 34 N. Y. R. 654.) *Rodes v. Bronson*, 34 N. Y. 654.

A law of Congress to change the currency in which a contract may be discharged, does not impair the obligation of the contract. (Faw v. Marsteller, 2 Cr. 20; Dowmans v. Dowmans, 1 Wash. Virg. 26; Pong v. Lindsay, Dyer, 82; Barrington v. Potter, Dyer, 81 B. fol. 67; United States v. Robertson, 6 Pet. 644; Conkey v. Hart, 4 Kern. 22; Mason v. Haile, 12 Wh. 370.) Metropolitan Bank v. Van Dyck, 27 N. Y. Rep. 455-8.

The above authorities also settle, that if a contract be made payable in a particular currency, and that currency ceases to exist before it is due, it must be discharged in the lawful currency at the date of maturity. See, particularly, Faw v. Marsteller, 2 Cr. 20, and Metropolitan Bank v. Van Dyck, 27 N. Y. Rep.

A law will not be held to be unconstitutional, unless it is clearly and plainly so. (Morris v. The People, 3 Den. 381; *Ex parte* McCollom, 1 Cow. 564; Fletcher v. Peck, 6 Cr. 87; Ogden v. Sanders, 12 Wh. 29; Adams v. Howe, 14 Mass. 345.) Metropolitan Bank v. Van Dyck, 27 N. Y. Rep. 460.

156. "PASS ANY BILL OF ATTAINDER OR EX POST FACTO LAW." Define *ex post facto* law? —These terms relate to criminal law only; but as the words "*ex post facto* law, or law impairing the obligation of contracts," are only separated by a comma, many of the judges treat the words in this connection as synonymous; and thus seem to make *ex post facto* apply to contracts. 142-143.

The critical reader is referred to the phrase in Burrill's law dictionary, for the civil law origin of the term, wherein will be found its exact application. *Que ab initio inutilis fuit institutio, ex post facto non convalescere non potest.* Translated: An institution or act which was of no effect at the beginning (when made or done), cannot acquire force or validity from after matter. *Nunquam crescit ex post facto præteriti delicti æstimatio.* The estimate of the character of a past offense is never enhanced by after matter. See 1 Kent's Com. 409. Here follows an instance where it is used in reference to contracts.

Ex post facto, literally construed, operating upon a previous fact, yet the restricted sense stated, is the one in which it has always been held. It was the sense in which it was understood at the time the Constitution was adopted, both in this country and in England. (1 Blackstone's Com. 46; *Calder v. Bull*, 3 Dallas, 390.) *Locke v. New Orleans*, 4 Wallace, 173, 174.

157. THE OBLIGATION OF THE CONTRACT.—The laws which exist at the time and place of the making of the contract, enter into and form a part of it; and they embrace alike those which affect its validity, construction, discharge and enforcement. What laws enter into the obligation of the contract?

155-159. (Green v. Biddle, 8 Wheat. 92; Bronson v. Kinzie, 1 How. 319; McCracken v. Hayward, 2 How. 612; People v. Bond, 10 California, 570; Ogden v. Sanders, 12 Wheat. 231.) Von Hoffman v. City of Quincy, 4 Wallace, 550. (This principle has been denied. Farnsworth v. Vance, 2 Coldwell (Tenn.) Rep. 111.)

160-161. As, if the acts so change the remedies as materially to impair the rights and interests of the owner, they are just as much a violation of the compact as if they overturned his rights and interests. (Green v. Biddle, 8 Wheat. 92.) Von Hoffman v. City of Quincy, 4 Wallace, 551. Or the Illinois two-thirds twelve months stay law. (1 Howard, 297.) Id. Or the State bankrupt insolvent laws, as to anterior contracts. Sturges v. Crowninshield, 4 Wheat. 122.) Id. But not as to subsequent contracts. Ogden v. Sanders, 1 Wheat. 213.) Id.

How are the validity and remedy connected?

155. The ideas of validity and remedy are inseparable, and both are parts of the obligation, which is guarantied by the Constitution against invasion. The obligation of the contract "is the law which binds the parties to perform their agreement." (Sturges v. Crowninshield, 12 Wheat. 257.) Von Hoffman v. City of Quincy, 4 Wallace, 552; Story v. Furnam, 25 N. Y. (11 Smith), 223. Where the State incorporated a bank, with no other stockholder than the State, which issued bills, for which all the bank assets were legally bound (and which provided that the issues were receivable for all public dues), laws which withdrew the funds from the bank, and appropriated them to various other purposes than paying the notes of the bank, impaired the obligation of the contract, and were unconstitutional. (Bronson v. Kinzie, 1 How. 311; McCracken v. Hayward, 2 How. 608.) Curran v. The State of Arkansas, 15 How. 310. The guaranty that the bills were receivable for all public dues, was a contract with the bill-holders; and to repeal the guaranty, impaired the contract as to bills then in circulation. Woodruff v. Trapnall, 10 How. 205; affirmed.

What of the repeal of bank charters?

157. Hawthorn v. Caleff, 2 Wall. 23. A law repealing a bank charter, does not impair the obligation of a contract, because the property *bona fide* held, is still a fund for the creditors. (Muma v. The Potomac Co. 8 Pet. 281.) Curran v. Arkansas, 15 How. 310, 331; This seems not to be so, as to creditors, where the corporators are liable personally for the issues. Corning v. McCulloch, 1 Comst. 47, 49; Conant v. Van Schaick, 24 Barb. 87; Bronson v. Kinzie, 1 How. 311; Hawthorne v. Caleff, Id. 311. The legislature may repeal the guaranty that the bills shall be received for all public dues; but the repeal only operates upon future issues, the guaranty remaining as to those outstanding. Woodruff v. Trapnall, 10 How. 206.

What is the doctrine of bridges?

A bridge charter, which declared that no other bridge should be built within the designated limits, is a contract, within the meaning of the Constitution. Bridge Proprietors v. Hoboken Co. 1 Wall. 146-7. But a railroad bridge is not a bridge, within the meaning of a statute of New Jersey of 1790. Bridge Proprietors v. Hoboken Co. 1 Wall. 147. A railroad bridge does not necessarily impair the right of an ordinary toll-bridge. (Mohawk Bridge Co. v. Utica & S. R. R. Co. 6 Paige, 564; Thompson v.

New York & Harlem R. R. Co. 3 Sandf. 625; *McRae v. Wilming-* 400-402.
ton Raleigh R. R. Co. 17 Conn. 56; *Enfield Toll-bridge v. The*
Hartford & New Haven R. R. Co. 17 Conn. 56;) Bridge Pro-
 prietors v. Hoboken, 1 Wall. 150-1. As to what a ferry privi-
 lege is, see *Conway v. Taylor*, 1 Black. 603; *Hartford Bridge Co.*
v. Union Ferry Co. 29 Conn. 210. It may be granted by Ken-
 tucky without the concurrent assent of Ohio. *Id.* (Cites *Trustees*
of Newport v. Taylor, 6 J. J. Marsh, 134.)

A contract is an agreement to do or not to do a particular Define a
 thing. (*Sturges v. Crowninshield*, 4 Wheat. 197; *Green v. Biddle*, contract?
 8 Wheat. 92; *Ogden v. Saunders*, 12 Wheat. 256, 297, 302, 316, 160.
 335; *Gordon v. Prince*, 3 Wash. C. C. Rep. 319.) *Story's Const.*
 § 1376.

This provision has never been understood to embrace other con- To what
 tracts than those which respect property, or some object of value, contracts
 and confer rights which may be asserted in a court of justice. only does
 the inhibition apply?
Dartmouth College v. Woodward, 4 Wh. 629. A private charter
 is such a contract. *Id.* 518. So also an act incorporating a bank-
 ing institution. *Providence Bank v. Billings*, 4 Pet. 514; *Gordon*
v. Appeal Tax Court, 3 How. 133; *Planter's Bank v. Sharp*, 6 Id.
 301; *Curran v. Arkansas*, 15 Id. 304. And a grant of land by the
 legislature of a State. *Fletcher v. Peck*, 6 Cr. 87; *Terrett v. Tay-*
lor, 9 Id. 43. And so is a compact between two States. *Green v.*
Biddle, 8 Wh. 1; *Allen v. McKean*, 1 Sumn. 276. And see 2
 Pars. on Cont. 509. An appointment to a salaried office, however,
 is not a contract, within the meaning of the Constitution. *Butler*
v. Pennsylvania, 10 How. 402; *Commonwealth v. Mann*, 5 W. &
 S. 418; *Commonwealth v. Bacon*, 6 S. & R. 322; *Barker v. Pitts-*
burgh, 4 Barr, 49; *Jones v. Shaw*, 15 Tex. 577. All contracts
 are subject to the right of eminent domain existing in the several
 States; and the exercise of this power does not conflict with the
 Constitution. *West River Bridge Co. v. Dix*, 6 How. 507; *Rundle*
v. Delaware & Raritan Canal Co., 14 Id. 80; *The State v. De Les-*
dernier, 7 Tex. 99.

It is a compact between two or more persons. (*Fletcher v.* 160.
Peck, 6 Cranch, 136; s. c. 2 Pet. Cond. 321.) *Story's Const.*
 § 1376.

A law of a State, issuing transferable swamp land-scrip, and
 exempting the land from taxation, for ten years or until reclaimed,
 constituted a contract, between the State and the holders of the
 land-scrip, issued under the act. *McGee v. Mathis*, 4 Wallace,
 156.

An act of incorporation is a contract between the State and the Is an act of
 stockholders. All courts, at this day, are estopped from question- incorpora-
 ing the doctrine. (*Dartmouth College v. Woodward*, 4 Wheat. 418.) tion a
 contract?
The Binghampton Bridge, 3 Wallace, 72.

Such contracts are construed liberally by the government. The
Binghampton Bridge, 3 Wallace, 74. Nothing is to be taken by
 intendment against the State. *The Binghampton Bridge*, 3 Wal-
 lace, 75; *The Charles River Bridge*, 11 Peters, 544; *Jefferson Br.*
Bank v. Skelley, 1 Black. 446. But the State may grant fran-
 chises by reference to another statute on the same subject-matter.

400. *Id.* After the grant of such franchises, the restraint is upon the legislature itself. *Id.*

The Supreme Court of the United States will determine for itself, irrespective of the State decisions, what is the contract of a State, *Jefferson Branch Bank v. Skelley*, 1 Black (U. S.), 442, 443.

What contracts are included?

155.

It includes executory as well as executed contracts. (*Fletcher v. Peck*, 6 Cranch, 137; s. c. 2 Pet. Cond. R. 321, 322.) Story's Const. § 1376. Whoever may be the parties to them. (*Fletcher v. Peck*, 6 Cranch, 87.) *Von Hoffman v. City of Quincy*, 4 Wallace, 549.

Because the State is not a single sovereign, but a part of the Union, whose Constitution is supreme and imposes limits upon the legislatures of the several States. (*New Jersey v. Wilson*, 7 Cranch, 164; *Terret v. Taylor*, 9 Cranch, 43.) *Von Hoffman v. City of Quincy*, 4 Wallace, 550.

Also express and implied contracts. The grantor is estopped by both. (*Fletcher v. Peck*, 6 Cr. R. 137; s. c. 2 Cond. R. 321, 322; *Dartmouth College v. Woodward*, 4 Wheat. R. 657, 658, 688, 689.) 1 Story's Const. § 1377.

And assessments upon the stockholders of banks which have gone into liquidation. *Commonwealth v. Cochituate Bank*, 3 Allen, Mass. 42.

What of retrospective laws?

571.

158. MERELY RETROSPECTIVE.—Because a law is merely retrospective, does not bring it within the prohibition. *Locke v. New Orleans*, 4 Wallace, 173.

The Constitution does not prohibit the States from passing retrospective laws generally, but only *ex post facto* laws. *Watson v. Mercer*, 8 Pet. 110. Retrospective laws, divesting vested rights, are impolitic and unjust; but they are not *ex post facto* laws within the meaning of the Constitution, nor repugnant to its provisions (*Albee v. May*, 2 Payne, 74), unless they impair the obligation of a contract. *Baltimore & Susquehanna R. R. Co. v. Nesbit*, 10 How. 401. Should a statute declare, contrary to the general principles of law, that contracts founded upon an illegal or immoral consideration, whether in existence at the time of passing the statute, or which might hereafter be entered into, should nevertheless be valid and binding upon the parties, all would admit the retrospective character of the enactment; but it would not be repugnant to the Constitution of the United States. *Satterlee v. Mathewson*, 2 Pet. 412; *Curran v. Arkansas*, 15 How. 10; *Aspinwall v. The Commissioners, &c.*, 22 How. 365; *Dartmouth College v. Woodward*, 4 Wh. 628. For the same inhibitions in the Constitution of Texas, see *Paschal's Annotated Dig.* 168, 170.

155-156.

The prohibition has no reference to the degree of impairment. The largest and least are alike forbidden. *Sturges v. Crowninshield*, 12 Wheat. 257; *Green v. Biddle*, 8 Wheat. 84; *Von Hoffman v. City of Quincy*, 4 Wall. 552; *Planter's Bank v. Sharp*, 6 How. 327; *Farnsworth v. Reaves*, 2 Coldwell, 111. Its value must not be diminished by legislation. (*Planter's Bank v. Sharp*, 6 How. 327.) *Von Hoffman v. City of Quincy*, 4 Wallace, 553.

That is directly, and not incidentally, and only by consequence. Von Hoffman v. City of Quincy, 4 Wall. 553.

The States may abolish imprisonment for debt. Beers v. Houghton, 9 Peters, 359; Mason v. Haile, 12 Peters, 373; Sturgis v. Crowninshield, 4 Peters, 200.) Von Hoffman v. City of Quincy, 4 Wallace, 553.

159. EXEMPTIONS.—And the States may exempt from forced sale the necessary implements of agriculture, the tools of a mechanic, and articles of necessity in household furniture—the things which in civilized communities belong to the remedy. Von Hoffman v. City of Quincy, 4 Wall. 553. The exact limit between right and remedy must be determined in every case upon its own circumstances. Id. If the right be impaired the law is void. (Bronson v. Kinzie, 1 Howard, 311; McCracken v. Hayward, 2 How. 608.) Von Hoffman v. City of Quincy, 4 Wallace, 554. The question between the remedy and the other parts of the contract cannot be considered *res integra*. (1 Kent's Com. 456; Sedg. on Stat. and Const. Law, 652; Mason v. Haile, 12 Wheat. 379.) Id.

How do exemption laws impair contracts?
157-160

401.

A State may disable itself by contract from exercising its taxing power in particular cases. (New Jersey v. Wilson, 7 Cranch, 166; Dodge v. Woolsey, 18 How. 331; Piqua Branch v. Knoop, 16 How. 331.) Von Hoffman v. City of Quincy, 4 Wallace, 554.

The legal obligation of a contract consists in the remedy given by law to enforce its performance, or to make compensation for the failure of performance. Johnson v. Higgins, 3 Metc. (Ky.), 566. A law which forbade the rendering of judgments for a given time was constitutional. Id. So, where a State has authorized a municipal corporation to contract and tax, to meet its engagements, the power cannot be withdrawn until the contract is satisfied. (People v. Bell, 10 California, 570; Dominic v. Sayre, 3 Sand. 555.) Von Hoffman v. City of Quincy, 4 Wallace, 554. It is a trust which neither the State nor corporation can annul. Id.

In what does the legal obligation consist?

157

160. STAY LAWS.—Statutes relating to levies on executions may be applicable to levies made before their enactment, as they affect the remedy and not the right. Grosvenor v. Chesley, 48 Maine, 369; Coriell v. Ham, 4 Greene (Iowa), 455; Swift v. Fletcher, 6 Minn. 550.

How do stay laws impair contracts?
159

But redemption laws, as to judgments upon anterior contracts, are unconstitutional. Scobey v. Gibson, 17 Ind. 572; Iglehart v. Wolfen, 20 Ind. 32.

And the laws for the release and discharge of securities. Swift v. Fletcher, 6 Minn. 550.

So of laws allowing the debtor to remove without subjecting his property to sale, so far as concerns judgment liens accruing prior to their passage. Tillotson v. Millard, 7 Minn. 513.

The legislature cannot extend the time for redeeming lands sold at tax sales. Robinson v. House, 13 Wis. 341. Nor apply appraisement laws to anterior contracts. Rosier v. Hale, 10 Iowa (2 With.), 470.

The Supreme Court of the United States will determine for itself, irrespective of the decision of the State courts, what is a contract

How will the S. C. construe?

By what will the S. C. of U. S. be governed in defining a contract? 155, 109. within the meaning of the Constitution. *Jefferson Branch Bank v. Skelley*, 1 Black, 443. A law authorizing a redemption of property sold by forced sale, impairs the obligation of a contract, and is unconstitutional as to mortgages and contracts of anterior date, to the redemption law. *Bronson v. Kinzie*, 1 How. 311; *McCracken v. Hayward*, 2 How. 612-615; *Gantly v. Ewing*, 3 How. 716-7; *Howard v. Bugbee*, 24 How. 464-5; *Bunn v. Gorgus*, 41 Penn. St. R. 441; *Weaver v. Mailot*, 15 La. 395; *Billmeyer v. Evans*, 40 Penn. St. R. 324. The legislature of a State has a right to bind the State by contract, so as to exempt persons, corporations, and things from taxation. *The Richmond R. R. Co. v. The Louisa R. R. Co.* 13 How. 71; *Gordon v. The Appeal Tax Court*, 3 How. 33; *New Jersey v. Wilson*, 7 Cr. 164; *Jefferson Branch Bank v. Skelley*, 1 Black, 447-8. But the intention to exempt must be clear. *Id.*; *Gilman v. The City of Sheboygan*, 2 Black, 513. And the *privilegia favorabilia* will be narrowly construed. *Rector, &c. v. The County of Philadelphia*, 24 How. 302.

Do laws which affect the remedy only impair? 402. **161. LAWS WHICH AFFECT THE REMEDY ONLY.**—Where there is no direct constitutional prohibition, a State may pass retrospective laws, such as in their operation may affect suits pending, and give to a party a remedy which he did not previously possess, or modify an existing remedy, or remove an impediment in the way of legal proceedings. (*Hepburn v. Curtis*, 7 Watts, 300; *Shenly v. Commonwealth*, 36 Penn. State, 57; *Foster v. Essex Bank*, 16 Mass. 245; *Rich v. Flanders*, 39 N. H. 325.) *Freeborn v. Smith*, 2 Wall. 175. The legislature may pass private acts authorizing sales by administrators, in a different manner from the general statutes regulating the subject. (*Mason v. Wait*, 4 Scam. 134.) *Florentine v. Barton*, 2 Wall. 216-7. Judicial sales of lands to pay the debts of a decedent's estate, are in the nature of a proceeding *in rem*, and the purchaser need only look to the order of sale. The State court is presumed to have correctly settled every judicial question, including the constitutionality of the act of assembly. (*Grignon v. Astor*, 3 How. 319.) *Florentine v. Barton*, 2 Wall. 216. The inhibition against impairing the obligation of contracts is upon the States not the United States. (*Evans v. Eaton*, 1 Pet. C. C. Rep. 322; In the matter of *Klein*, 1 How. 277; *Kunzler v. Kohaus*, 5 Hill, 325.) *Metropolitan Bank v. Van Dyck*, 27 N. Y. 453.

The cases which draw the distinction between *ex post facto* laws; the laws impairing the obligation of contracts; retrospective laws, and laws which only affect the remedy, will be found fully collected in *Paschal's Annotated Digest*, notes 61, 157, 168, 410, 1107-1109. And for a very learned and exhaustive treatise upon the whole subject, see *Story's Const. Book III. ch. XXXIV., § 1374-1400.*

What of usurious contracts?

The States may pass laws validating contracts which were usurious and void when made. *Welsh v. Wadsworth*, 30 Conn. 149. But not to operate unreasonably and unjustly upon antecedent rights. *Id.* And may change the interest laws relieving from penalties. *Wood v. Kennedy*, 19 Ind. 68. And the laws of costs as to pending suits. *Taylor v. Keeler*, 30 Conn. 324. But not the compensation of rights already vested. *State v. Auditor*,

Costs?

33 Miss. 287. And providing for the validity of marriages. 402.
 Goshen v. Richman, 4 Allen (Mass.), 458. And changing the
 presumptions in favor of tax sales. Hickor v. Tallman, 38 Barb. Evidence?
 N. Y. 608. And curing irregularities in conveyances, as to the
 parties and subsequent purchasers; but not to disturb vested
 rights. Thompson v. Morgan, 6 Minn. 292. Convey-
 ances?

[2.] No State shall, without the consent of the Congress, lay any imposts or duties on imports or ex-ports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any State on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress. [3.] No State shall, without the consent of Congress, lay any duty of tonnage, keep troops or ships-of-war in time of peace, enter into any agreement or compact with another State, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

What are the inhibitions upon the States without the consent of Congress?
 403-406.
 P. 395, 397.

162. For the definitions of "imposts" and "duties" see notes 75 to 77. For a history of this clause, see journals of the Convention, 222, 227, 275, 301, 303, 318, 377 and 378.

"AN IMPOST OR DUTY ON IMPORTS," is a custom or tax levied on articles brought into the country. Brown v. Maryland, 12 Wheat. 446, 447. Imports are things imported—the articles themselves which are brought into the country. It is not merely a duty on the act of importation, but it is a duty on the thing imported. It is not confined to a duty levied while the article is entering the country, but extends to a duty levied after it has entered the country. (Brown v. Maryland, 12 Wheat. 419, 446, 447.) Story's Const. § 1019; see Gibbons v. Ogden, 9 Wheat. 199-201. The power to impose duties on imports is exclusive in Congress. Pervear v. The Commonwealth, 5 Wall. 479. A charge on vessels by the State for the benefit of the master and warders of the port is unconstitutional. The Southern Steamship Company v. The Master, &c. 6 Wall.

What is a duty on imports?
 138.
 274.
 86-89.
 403.

It was really intended to make the vast inter-state commerce as nearly free as possible. The ordinance of the city of Houston requiring wharfage duties of steamboats, does not infringe this provision of the Constitution. Sterrett v. Houston, 14 Tex. 166.

"EXCEPT WHAT MAY BE ABSOLUTELY NECESSARY."—This is the strongest qualification of "necessary" See McCulloch v. Maryland, 4 Wheat. 316; Kent's Com. 398-401; Story's Const. § 1033.

Inspection? "INSPECTION."—The tax or duty of inspection, is frequently, if
 404. not always, paid while the article is in the bosom of the country. *Brown v. Maryland*, 12 Wheat. 420.

The exception was made because the tax would otherwise have been within the prohibition. *Id.* See the subject discussed. *Id.*

The State has no right to tax the goods imported, in the hands of the importer. *Id.* This language means the same thing as the inhibition on the United States against laying a tax on articles exported from any State. *Id.* Story's Const. § 1030. Upon the same principles, or their analogies, it was held that the State of Maryland had not the constitutional right to tax the branch of the United States bank located in Maryland. *McCulloch v. Maryland*, 1 Wheat. 316; *Kent's Com.* 398, 401; Story's Const. § 1033-1053. The sale of liquors within a State is subject exclusively to State control. (*License cases*, 5 Wall. 462.) *Pervear v. The Commonwealth*, 5 Wall. 479.

What is
 tonnage?
 407. **163.** "LAY ANY DUTY OF TONNAGE, &C."—This form of expression occurs nowhere else in the Constitution. TONNAGE [*tonnagium*] is a custom or impost upon wines or other merchandise exported or imported, according to a certain rate per ton. (*Spelman; Cowell.*) *Burrill's Law Dic.*: A duty or impost upon ships estimated per ton. *Webster's Dic.*, TONNAGE.

Define
 troops?
 122, 123. **164.** "KEEP TROOPS OR SHIPS-OF-WAR IN TIME OF PEACE."—This means organized troops, or armies, and a navy; because these are national powers. See Articles of Confederation, *ante*, p. 12, Art. VI.; Story's Const. § 1401-1409. In certain emergencies, States may raise troops to repel invasions or suppress insurrections. Story's Const. § 1404. *Luther v. Borden*, 7 How. 1.

Define
 agreement
 or compact?
 152. "AGREEMENT OR COMPACT," properly applies to such as regarded
 178. what might be deemed mere private rights of sovereignty, such as boundaries, land, and other internal regulations for the mutual comfort and convenience of States bordering on each other. Story's Const. § 1403. These words are used in their broadest sense; they were intended to cut off all negotiation and intercourse between the State authorities and foreign nations. *Hohnes v. Jennison*, 14 Pet. 572, 574. And, therefore, no State can, without the consent of Congress, enter into any agreement or compact, to deliver up fugitives from justice from a foreign State, who may be found within its limits. *Id.*; 3 Opin. 661. This prohibition is political in its character, and has no reference to a mere matter of contract, or to the grant of a franchise which in nowise conflicts with the powers delegated to the general government by the States. *Union Branch R. R. Co. v. East Tennessee & Georgia R. R. Co.* 14 Ga. 327. A compact entered into between two States, with the assent of Congress, is binding on those States and the citizens of each. *Fleegeer v. Pool*, 1 McLean, 185. See Story's Const. § 1403; 1 Tucker's *Black. Com. App.* 301.

ARTICLE II.

Where is
 the execu-
 tive power?
 SEC. I.—[1.] The executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years, and

together with the Vice-President, chosen for the same term, be elected as follows. The term of office?

165. THE EXECUTIVE POWER.—The object of this department is to insure the execution of the laws. 1 Kent's Com. 285. With energy in the executive and safety to the people. Story's Const. § 1417. The ingredients for energy, are unity, duration, adequate provisions for its support; and, for safety, a due dependence on the people, and a due responsibility to the people. (Federalist, No. 70; 1 Kent's Com. Lect. 13, pp. 253, 254.) Story's Const. § 1418. What is the object?

The powers of the President are not executive only. The veto power and the appointing power are not strictly executive powers; no more so than when exercised by Congress or the States. Bates on *Habeas Corpus*, 5th July, 1861. He is a civil magistrate, to whom all military officers are subordinate. Id. In calling out the militia to see the laws faithfully executed, he acts as a civil magistrate upon the same principle that a court calls out the *posse*. Id. In times of great danger, when the very existence of the nation is assailed, the President may order military arrests. Id. Define the executive power? 67, 199.

We must not forget that this power of appointment to office is essentially an executive function. It belongs essentially to the executive department rather than to the legislative or judicial. If no provision on the subject had been made by the Constitution, it would have been held appurtenant to the President as the head of the executive department specially charged with the execution of the laws. Stanbery on the executive power. See *Confederation, ante* Article VI. p. 14; 2 Elliot's Debates, 358; Federalist, Nos. 67, 70, 1 Kent's Com. 271-303; Journal of Convention, 68, 89, 96, 136, 211, 222, 324, 332, 333; 2 Pitk.'s Hist. 252; 2 Curtis' Hist. of Const. ch. III., pp. 56-60; Story's Const. ch. XXXVI., § 1440-1448, and voluminous notes of the 3d edition. 179. 174. 409.

A proposition was made in the Convention for an executive with a plurality of persons. Journal of Convention, 124. Mr. Calhoun advocated a dual executive at a later day. See Calhoun's Essay on the Const.; Story's Const. § 1426-1429.

166. The following is the list of Presidents who have been chosen under this Constitution:— Who have been the presidents? how long?

NAME.	NATIVITY.	RESIDENCE.	SERVICE.	
George Washington.	Virginia.	Virginia.	4 March, 1789,	4 March, 1793.
George Washington.	"	"	" " 1793,	" " 1797.
John Adams.	Massachusetts.	Massachusetts.	" " 1797,	" " 1801.
Thomas Jefferson.	Virginia.	Virginia.	" " 1801,	" " 1805.
Thomas Jefferson.	"	"	" " 1805,	" " 1809.
James Madison.	"	"	" " 1809,	" " 1813.
James Madison.	"	"	" " 1813,	" " 1817.
James Monroe.	"	"	" " 1817,	" " 1821.
James Monroe.	"	"	" " 1821,	" " 1825.
John Quincy Adams.	Massachusetts.	Massachusetts.	" " 1825,	" " 1829.
Andrew Jackson.	South Carolina.	Tennessee.	" " 1829,	" " 1833.
Andrew Jackson.	"	"	" " 1833,	" " 1837.
Martin Van Buren.	New York.	New York.	" " 1837,	" " 1841.
William H. Harrison.	Virginia.	Ohio.	" " 1841,	4 April, 1841.
John Tyler.	"	Virginia.	6 April, 1841,	4 March, 1845.
James K. Polk.	North Carolina.	Tennessee.	4 March, 1845,	" " 1849.
Zachary Taylor.	Virginia.	Louisiana.	" " 1849,	9 July, 1850.
Millard Fillmore.	New York.	New York.	10 July, 1850,	4 March, 1853.
Franklin Pierce.	New Hampshire.	New Hampshire.	4 March, 1853,	" " 1857.
James Buchanan.	Pennsylvania.	Pennsylvania.	" " 1857,	" " 1861.
Abraham Lincoln.	Kentucky.	Illinois.	" " 1861,	" " 1865.
Abraham Lincoln.	"	"	" " 1865,	14 April, 1865.
Andrew Johnson.	North Carolina.	Tennessee.	15 April, 1865,	4 March, 1869.
U. S. Grant.	Illinois.	Washington, D. C.	4 March, 1869,	4 March, 1873.
U. S. Grant.	"	"	4 March, 1873,	

How are
electors
appointed?

[2.] Each State shall appoint, in such manner as the legislature thereof may direct, a number of electors equal to the whole number of senators and representatives to which the State may be entitled in the Congress; but no senator or representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.

Disqualifi-
cations?

Define
electors?

167. "ELECTORS," as here used, mean the persons chosen to cast the votes in the first instance for President and Vice-President. All the legislatures have, long since, directed that they shall be "*appointed*," that is, chosen by the people, except South Carolina, which appointed by the legislature. See Story's Const. § 1472; 3 Elliot's Debates, 100, 101.

409a.

16-17.

Thus the "electors" for members of Congress, indirectly choose the "electors" for President, Vice-President, and Senators.

But the House of Representatives in one contingency, and the Senate in another, may choose the President. Therefore, however chosen, it results that the President is, indirectly, chosen by the same electors who choose the popular branch of the State legislature.

How many
electors?

As there are now thirty-seven States, the senators represent 74 electoral votes; add to these 243 representatives, and the electoral vote of 1868 will be 317; necessary to a choice 159. That is if no new State be added by the second session of the fortieth Congress; and if all the non-reconstructed States be allowed to vote. The number of electoral votes to which Virginia, North and South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, Arkansas and Texas, would be entitled, under the apportionment are 70.

23.

Necessary
to a choice?

The question as to whether these States shall vote, and *who* shall choose the electors, is now one of the exciting issues of the day. See Story's Const. § 1454-1488.

46.

175-185.

The attempted independence of the electors has failed. Story's Const. § 1463; Rawle's Const. ch. 5, p. 58.

[ARTICLE XII.—AMENDMENT.]

How is the
President
elected?

[1]. The electors shall meet in their respective States, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same State with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President; and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and the number of votes for each, which

167.

How are the
votes certi-
fied?

list they shall sign and certify, and transmit sealed to Returns.
the seat of the government of the United States,
directed to the President of the Senate; the President of the Senate shall, in the presence of the Senate
and House of Representatives, open all the certificates, And counted?
and the votes shall then be counted; the person having the greatest number of votes for President shall
be the President, if such number be a majority of the
whole number of electors appointed; and if no person
have such majority, then from the persons having the If no election?
highest numbers, not exceeding three, on the list of
those voted for as President, the House of Representatives shall choose immediately by ballot the President.
But in choosing the President, the votes shall be taken How do the States vote?
by States, the representation from each State having
one vote; a quorum for this purpose shall consist of a
member or members from two-thirds of the States, and
a majority of all the States shall be necessary to a
choice. And if the House of Representatives shall If the House refuse to choose?
not choose a President, whenever the right of choice
shall devolve upon them, before the fourth day of
March next following, then the Vice-President shall 172.
act as President, as in the case of the death or other
constitutional disability of the President.

168. The original read as follows:—

“[3.] The electors shall meet in their respective States, and vote What was the repealed section?
by ballot for two persons, of whom one at least shall not be an inhabitant of the same State with themselves. And they shall
make a list of all the persons voted for, and of the number of
votes for each; which list they shall sign and certify, and transmit sealed to the seat of the government of the United States,
directed to the President of the Senate. The President of the P. 32.
Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be
counted. The person having the greatest number of votes shall be
the President, if such number be a majority of the whole number
of electors appointed; and if there be more than one who have
such majority, and have an equal number of votes, then the House
of Representatives shall immediately choose by ballot one of them
for President; and if no person have a majority, then from the five
highest on the list the said House shall in like manner choose the

Choice.

President. But in choosing the President, the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of all the States shall be necessary to a choice. In every case, after the choice of the President, the person having the greatest number of votes of the electors shall be the Vice-President. But if there should remain two or more who have equal votes, the Senate shall choose from them by ballot the Vice-President."

When
do the
electors
meet and
vote?

The electors shall meet on the first Wednesday in December, by act 1st March, 1792. 1 Stat. 239. Before the first Wednesday in January, by the same act. On the second Wednesday in February, by the same act. In the election of 1864, the votes of Louisiana, Arkansas, and Tennessee for President were given, but not counted. Virginia, North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, and Texas, did not vote in this election. On a motion to discharge a defendant arrested upon a *capias ad respondendum*, by a marshal appointed by the President *de facto*, of the United States, the court will not decide the question whether he has been duly elected to that office. *Peyton v. Brent*, 3 Cr. C. C. 424.

If ever the tranquillity of this nation is to be disturbed and its liberties endangered by a struggle for power it will be upon the subject of the choice of a President. 1 Kent's Com. 274.

If there be four candidates and two of them have an equal number of votes, the Constitution makes no provision. Story's Const. § 1471.

If the
electors do
not choose
a Vice-
President?

[2.] The person having the greatest number of votes as Vice-President shall be the Vice-President, if such number be a majority of the whole number of electors appointed; and if no person have a majority,

12th Amend.

410.

then from the two highest numbers on the list the Senate shall choose the Vice-President: a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice.

168*a*. Richard M. Johnson was elected Vice-President under this clause in 1837. See note 37.

What are
the qualifi-
cations of
Vice-Presi-
dent?
12th Amend.

[3.] But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

168*b*. For commentaries on this amendment see 1 Kent's Com. 260, 262; Rawle on the Const. ch. 5, pp. 54, 55; Story's Const. § 1468-1473.

[3.] The Congress may determine the time of choosing the electors, and the day on which they shall give their votes; which day shall be the same throughout the United States.

What is the power of Congress as to the time of election?

168*c*. On the Tuesday next after the first Monday in November; by act 23d January, 1845. 5 Stat. 721.

When to be held?

On the first Wednesday in December; by act 1st March, 1792. 1 Stat. 239. All the States now choose the electors by the people. See Story's Const. § 1475, 1476.

[4.] No person except a natural born citizen, or a citizen of the United States at the time of the adoption of this Constitution, shall be eligible to the office of President; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States.

What are the qualifications for President?

18, 19, 35. 220-222.

169. "A NATURAL BORN CITIZEN."—Not made by law or otherwise, but *born*. And this class is the large majority; in fact the mass of our citizens; all others are exceptions specially provided for by law. As they become citizens, *by birth*, so they remain citizens during their natural lives, unless, by their own voluntary act, they expatriate themselves and become citizens or subjects of another nation. For we have no law (as the French have) to *decitizenize* a citizen who has become such either by the natural process of birth or the legal process of adoption. Attorney-General Bates on Citizenship, 10 Op. 382.

Who are eligible?

274.

The Constitution does not make the citizens (it is, in fact, made by them). It only intends and recognizes such of them as are natural, home-born, and provides for the naturalization of such of them as are alien, foreign-born, making the latter, as far as nature will allow, like the former. *Id.* We have no middle class or denizens. (1 Sharswood's Bl. Com. 374.) *Id.* 9. But Attorney-General Legaré thought there might be. (4 Opin. 147.) *Id.* The example of a Roman citizen and St. Paul's case and claim thereto cited. *Id.* Paul's is a leading case of the "*Jus Romanum*;" it is analogous to our own; it establishes the great *protective rights* of the citizen, but, like our own national Constitution, it is silent about his *powers*. *Id.* 12.

Does the Constitution make the citizens?

93.

279.

"NATURAL BORN CITIZEN" recognizes and reaffirms the universal principle common to all nations, and as old as political society, that the people born in a country do constitute the nation, and, as individuals, are *natural* members of the body politic. Bates on Citizenship, 10 Op. 382.

Define natural born?

220.

Every person born in the country is, at the moment of birth, *prima facie* a citizen. *Id.*

Nativity furnishes the rule, both of duty and of right, as between the individual and the government. (2 Kent's Com. Part 4, Lect. 1.)

What does nativity imply?

25; 1 Bl. Com. ch. 10, p. 365; 7 Coke's Rep. and (Calvin's Case, 11 State Trials, 70) Doe v. Jones, 4 Term. 300; Shanks v. Dupont, 3 Pet. 246; Horace Binney, 2 Am. Law Reporter, 193.) Bates on Citizenship, p. 12.

Who be-
sides natu-
ral born are
eligible?
220.

170. "OR A CITIZEN OF THE UNITED STATES AT THE TIME OF THE ADOPTION OF THIS CONSTITUTION."—The declaration of independence of 1776, invested all those persons with the privilege of citizenship who resided in the country at the time, and who adhered to the interests of the colonies. (Ingliss v. The Sailors' Snug Harbor, 3 Pet. 99, 121.) United States v. Ritchie, 17 How. 540; Paschal's Annotated Digest, note 350, p. 209.

274.

85, 19.

220.

There can be few of the class of the foreign born, such as Alexander Hamilton, who are now surviving, who are eligible to the presidency. Considering the ages of all such, no person of foreign birth can now ever be President of the United States under this Constitution. (See Story's Const. § 1479; Journals of Convention, 267, 325, 361.) Still, in this case, as in the qualifications of senators and representatives in Congress, the question is not so clear as to who are "natural born citizens of the United States." Are the *ante-nati* of the Republic of Texas, for example, "natural born citizens of the United States?" They were born upon what is *now* soil of the United States; but they were not "citizens at the moment of their births." About the *post nati* there can be no doubt; but, according to the principles of Calvin's case, which was so learnedly and quaintly discussed, none of the *ante-nati* of our *acquired* territories have now the full *status* of citizenship; and certainly they are no other than adopted or naturalized citizens, in contradistinction to "natural born citizens." See Calvin's Case, 11 State Trials, 70 *et seq.*

46.

252-263.

And here, again, the language of this clause has to be construed in connection with other clauses and the general understanding of *mankind*. For there is nothing in this clause to indicate *sex* unless it be the word "PRESIDENT." Our advocates for equal "*Woman's Rights*" might consider this a very narrow definition; and they might even urge that the pronoun "he," in other clauses, does not protect woman from the severest criminal statutes; nor would it deprive woman of the guaranties accorded to "him" and "himself," standing for the antecedent of "person" in the Vth and VIth amendments.

How is the
Constitu-
tion to be
interpreted?

The claims of males to be alone entitled to be "*Senators*" and "*Representatives*," is believed to rest alone upon the *masculinity* of the word, the single "*he*," and the common sense and understanding of men. These remarks are not made in any speculative or hypercritical spirit, but to impress upon the reader the necessity of applying the same common-sense tests to this Constitution as to all other instruments. That is, not to construe it alone by the very technicalities of the words in a single member of a sentence; but to apply to it the same rules of interpretation which we apply to all other instruments, laws, and statutes. That is to construe it by its language, nature, reason, and spirit, objects and intention, and the interpretations of contemporaneous history, having an eye to

the old law, the mischief and the remedy. See Story's Const. chapters three, four, and five, and voluminous references.

171. "WHO SHALL NOT HAVE ATTAINED THE AGE OF THIRTY YEARS."—This is a limitation upon the people themselves. If all the age fix? of the nation speak with one united voice, they cannot constitutionally make any man President who happens to be under thirty-five. Bates on Citizenship, p. 18.

"FOURTEEN YEARS' RESIDENCE."—By "residence" is to be understood, not an absolute inhabitancy within the United States during the whole period; but such an inhabitancy as includes a permanent domicile in the United States. Story's Const. § 1479.

[5.] In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the Vice-President, and the Congress may by law provide for the case of removal, death, resignation, or inability, both of the President and Vice-President, declaring what officer shall then act as President, and such officer shall act accordingly until the disability be removed, or a President shall be elected.

If there be a vacancy in the Presidency, who then becomes President?
36.
411.

172. The following is the act of Congress for filling vacancies: Act of March 1, 1792, 1 St. 239.
"Sec. 8. In case of removal, death, resignation, or inability both of the President and Vice-President of the United States, the President of the Senate *pro tempore*, and in case there shall be no President of the Senate, then the Speaker of the House of Representatives, for the time being, shall act as President of the United States until the disability be removed or a President shall be elected." 38, 26.
If in the Vice-Presidency?

"9. Whenever the offices of the President and Vice-President shall both become vacant, the Secretary of State shall forthwith cause a notification thereof to be made to the executive of every State, and shall also cause the same to be published in at least one of the newspapers printed in each State, specifying that electors of the President of the United States shall be appointed or chosen in the several States within thirty-four days preceding the first Wednesday in December then next ensuing: *Provided*, there shall be the space of two months between the date of such notification and the said first Wednesday in December; and if the term for which the President and Vice-President last in office were elected, shall not expire on the third day of March next ensuing, then the Secretary of State shall specify in the notification that the electors shall be appointed or chosen within thirty-four days preceding the first Wednesday in December in the year next ensuing; within which time the electors shall accordingly be appointed or chosen, and the electors shall meet and give their votes on the said first

When shall there be a new election?
411, 412.

Time. Wednesday in December, and the proceedings and duties of the said electors and others shall be pursuant to the directions prescribed in this act." Act of 1 March, 1792, § 8, 9. 1 Stat. 239. Brightly's Dig. 253, 254. The Constitution does not provide for a vacancy in case of non-election. Therefore, the constitutionality of some parts of this act has been doubted. Story's Const. § 1480-1484; Rawle's Const. ch. 5, p. 57; 1 Tucker's Black. App. 320; 2 Elliot's Debates, 359, 360.

Suppose there is no election?

What Vice-Presidents have become Presidents?

WILLIAM HENRY HARRISON having died on the 4th day of April, 1841, JOHN TYLER took the oath of office as President, on the 6th day of April, 1841; ZACHARY TAYLOR died on the 9th day of July, 1850, and the next day MILLARD FILLMORE took the presidential oath; ABRAHAM LINCOLN was assassinated by John Wilkes Booth, on the 14th day of April, 1865, and, on the 15th, ANDREW JOHNSON was inaugurated President.

What of the President's compensation?

[6.] The President shall, at stated times, receive for his services a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States or any of them.

413.

What is the amount?

173. The President's salary was fixed at twenty-five thousand dollars per annum, by the act of 18th Feb., 1793. 1 St. 318, Brightly's Digest 818.

The government provides and furnishes a mansion for his use. For the wisdom of this independence in regard to salary, see 1 Kent's Com. 263; Federalist, No. 73; Story's Const. § 1486.

[7.] Before he enter on the execution of his office, he shall take the following oath or affirmation:—

What is the President's oath?

"I do solemnly swear (or affirm), that I will faithfully execute the office of President of the United States, and will, to the best of my ability, preserve, protect, and defend the Constitution of the United States."

242.

414.

174. The President is the only officer required to take this oath. Metropolitan Bank v. Van Dyck, 27 N. Y. Rep. 408.

This oath embraces all the laws, Constitution, treaties, and statutes. And it constitutes the President, above all other officers, the guardian, protector, and defender of the Constitution. Bates on *Habeas Corpus*, 5th July, 1861. See Stanbery on vacancies. The acts of 1795 and 1807, came in aid of these duties. Id.

What does to faithfully execute embrace?

"FAITHFULLY TO EXECUTE THE OFFICE OF PRESIDENT."—This embraces the general office of the executive, and also the official powers not in their nature executive, such as the veto power; the

treaty-making, power; the appointing power, and the pardoning power. Bates on *Habeas Corpus*, 5th July, 1861. 165.

SEC. II.—[1.] The President shall be commander-in-chief of the army and navy of the United States, and of the militia of the several States, when called into the actual service of the United States; he may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices, and he shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment. What are the President's powers? 124-178. 130. 416. 177. 40, 191. 417. 194.

175. "COMMANDER-IN-CHIEF."—This was to give the exercise of power by a single hand. See 1 Kent's Com. Lect. 13, p. 283; 3 Elliot's Debates, 103; Story's Const. § 1491, 1492; Rawle's Const. ch. 20, p. 193. The power may be delegated. Id. 5 Marshall's Life of Washington, ch. 8, pp. 583, 584, 588. Why commander? 415.

The President is not obliged to take, personally, the command of the militia, when called into the service of the general government, but he may place them under the command of officers of the army of the United States, to whom, in his absence, he may delegate the powers vested in him by the Constitution. Any officer of the army may, therefore, be required, by orders emanating from the President, to perform the appropriate duties of his station in the militia, when in the service of the United States, whenever the public interest shall so require. But this power must be exercised in strict accordance with the right of appointment of militia officers, which is expressly reserved to the States. 2 Opin. 711-12. See 2 Story's Const. § 1490-2. As commander-in-chief, the President has the right to decide what officer shall perform any particular duty, and, as supreme executive magistrate, he has the power of appointment. Congress could not take away this power. 9 Op. 468, 518. But this power is to be used only in the manner prescribed by the legislative department. 9 Op. 518. Must he command in person? 165.

The President has unquestioned power to establish rules for the government of the army, and the Secretary of War is his regular organ to administer the military establishment of the nation, and rules and orders promulgated through him must be received as the acts of the executive, and, as such, are binding on all within the sphere of his authority. (*United States v. Eliason*, 16 Pet. 291.) But this power is limited, and does not extend to the repeal or contradiction of existing statutes, nor to the making of provisions of a legislative nature. (6 Opin. 10.) Bates, 18th April, 1861. What rules may the President establish? 129, 134.

But the powers of the President over the militia, only commence when those of the governors cease; that is, when the

Militia. militia are called into the actual service of the United States. *Id.* The President cannot establish a bureau of militia. *Id.*

What of opinions in writing? **176.** "OPINIONS IN WRITING."—This practice commenced with the administration of President Washington. The depository of such opinions has generally been in the State department. The attorney-general frequently gives opinions to the President, as the law officer of the government, which are published in the current series.

416

What are the Departments, and who are the cabinet? The "DEPARTMENTS" are now called the State, the Treasury, the War, the Navy, the Post-office, the Attorney-General's, and the Interior departments. The heads of these are known as the President's advisers or cabinet officers. Their respective duties are defined by statutes, which will be found collected under appropriate heads in Mr. Brightly's Digest.

The opinions are more frequently given in secret cabinet councils. But Mr. Jefferson thought the separate opinions in writing more consistent with the Constitution. (4 Jeff.'s Corresp. 143, 144.) Story's Const. § 1493, note 3. Upon the reconstruction laws, President Johnson took the opinions in council; and he seems to have authorized their publication.

Define reprieves? **177.** "REPRIEVES."—The withdrawing of a sentence of death for an interval of time, whereby the execution is suspended. 4 Bl. Com. 394; Burrill's Law Dic., REPRIEVE; *Ex parte* Wells, 18 How. 307, 315; Story's Const. 3d Ed. p. 305, § 1505. The power is not to pardon, but to *grant* reprieves and pardons. *Ex parte* Wells, 18 How. 316.

Define pardon? "AND PARDONS."—In common parlance, forgiveness, release, remission. *Ex parte*, Wells, 18 How. 307. In law every pardon has its particular denomination. They are general, special or particular, conditional or absolute, statutory, not necessary in some cases, and in some grantable of course. *Id.*

Here it is meant, that the power is to be used according to law; that is, as it had been used in England, and these States when they were colonies. *Id.* That is, according to the principles of the English common law, at the time of the adoption of this Constitution. (*United States v. Wilson*, 7 Pet. 162.) *Ex parte* Wells, 18 How. 309. Hence, when the words "to grant pardons" were used in the Constitution, they conveyed to the mind the authority as exercised by the English crown, or by its representatives in the colonies. (*Cathcart v. Robinson*, 5 Pet. 261, 280; *Flavel's Case*, 8 Watts and Sergeant, 197.)

A pardon is said by Lord Coke to be a work of mercy, "whereby the king, either before attainder, sentence, or conviction, or after, forgiveth any crime, offense, punishment, execution, right, title, debt, or duty, temporal or ecclesiastical." (3 Inst. 233.) *Ex parte* Wells, 18 How. 311, 312. The whole subject discussed. *Id.*

When may the President pardon? He may pardon as well before trial and conviction as afterward. 6 Opin. 20. (See the proclamations of amnesty in relation to the rebellion.) And after the expiration of the imprisonment which forms a part of the sentence. *Stetler's Case*, Phila. R. 302. He may grant a conditional pardon; *Ex parte* Wells, 18 How. 307; 1

Opin. 341; provided the condition be compatible with the genius of our Constitution and laws. Id. 482. Where the condition is such that the government has no power to carry it into effect, the pardon will be in effect unconditional. 5 Id. 368. See *Flavell's Case*, 8 W. & S. 197; *United States v. Wilson*, 7 Pet. 161; *People v. Potter*, 1 Parker C. R. 47. The pardoning power includes that of remitting fines, penalties, and forfeitures, under the revenue laws; 2 Op. 329; the laws prohibiting the slave-trade; 4 Id. 573; fines imposed on defaulting jurors, 3 Id. 317; 4 Id. 458; for a contempt of court; 3 Id. 622; and in criminal cases; Id. 418; even treason, amnesty proclamations, and warrants. And the same power is possessed over a judgment, after security for its payment shall have been given, as before. Id. But the President has no power to remit the forfeiture of a bail-bond. 4 Id. 144. Nor, it seems, can he, by a pardon, defeat a legal interest or right which has become vested in a private citizen; as, for example, the vested right of an officer making a seizure. *United States v. Lancaster*, 4 Wash. C. C. 64; 4 Opin. 376; 6 Id. 615; and see 5 Id. 532, 579. The grant of the pardoning power neither requires nor authorizes the President to re-examine the case upon new facts; nor to grant a pardon upon the assumption of the new facts alleged. 1 Opin. 359. A pardon is a private though official act; it must be delivered to and accepted by the criminal, and cannot be noticed by the court, unless brought before it judicially by plea, motion, or otherwise. *United States v. Wilson*, 7 Pet. 150. The President alone can pardon offenses committed in a territory in violation of acts of Congress 7 Opin. 561. He has power to order a *nolle prosequi* in any stage of a criminal proceeding, in the name of the United States. 5 Id. 729. He pardoned the rebels upon their taking the oath of amnesty, with certain exceptions, by general proclamation. The warrants issued to those within special exceptions were all conditional.

The power to pardon is unlimited, with the exceptions stated. It extends to every offense known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment. This power of the President is not subject to legislative control.

Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders. The benign prerogative of mercy cannot be fettered by any legislative restrictions. *Ex parte Garland*, 4 Wall. 380.

A pardon reaches both the punishment prescribed for the offense and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out the existence of the guilt; so that in the eye of the law the offender is as innocent as if he had never committed the offense. If granted before conviction, it prevents any of the disabilities consequent upon conviction from attaching; if granted after conviction, it removes the penalties and disabilities, and restores him to all his civil rights; it makes him, as it were, a new man, and gives him a new credit and capacity. *Ex parte Garland*, 4 Wallace, 380, 381. This court is obliged to conform to these principles. Judge Duval, in the case of the United

417.

In what cases?

Must the pardon be accepted?

231.

232.

What is the extent of the power?

Can Congress limit the pardon?

What does the pardon reach?

418.

Devine. States v. Devine, Texas, June Term, 1867. There is only one limitation to its operation; it does not restore offices forfeited, or property or interests vested in others in consequence of the conviction and judgment. (4 Blackstone's Com. 402; 6 Bacon's Abridgment, tit. Pardon; Hawkins, book 2, ch. 37, § 44 and 54.) *Ex parte* Garland, 4 Wallace, 381.

What is the effect of the pardon of the rebels? 142, 143, 242, 254. The pardon produced by the petitioner is a full pardon "for all offenses, from participation, direct or implied, in the rebellion." This relieves him from all penalties and disabilities attached to the offense of treason, committed by his participation in the rebellion. So far as that offense is concerned, he is thus placed beyond the reach of punishment of any kind. (*Ex parte* Garland, 4 Wallace, 381.) The United States v. Devine, before Judge Duval, in the United States Circuit Court for the Western District of Texas, June Term, 1867. The expurgatory oath required by attorneys cannot affect an attorney, who had been previously such of the court, after pardon. Congress cannot inflict punishment beyond the reach of executive clemency. *Ex parte* Garland, 4 Wallace, 381.

242. The remission of a penalty after it has been paid has no effect. Edwin M. Stanton, Attorney-General, 3d Jan. 1861.

274. See 1 Kent's Com. 11 Ed. Part II. Lect. 13, p. 283-285 and notes; Story's Const. § 1494, 1504; Federalist, No. 74; 2 Wilson's Law Lect. 198-200; 2 Elliot's Debates, 366; Rawle's Const. ch. 17, p. 178.

What is the power of the President as to treaties and appointments? 179. [2.] He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur; and he shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law. But the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.

418. 426. 163.

178. "HE SHALL HAVE POWER, BY AND WITH THE ADVICE AND CONSENT OF THE SENATE, TO MAKE TREATIES, PROVIDED TWO-THIRDS OF THE SENATORS PRESENT CONCUR."

How is the advice usually given? This "advice and consent" is usually given after the treaty, or appointment is made and signed by the President. The work is then sent to the Senate, to ask the "CONCURRENCE of two-thirds." But it is in the option of the President to ask the advice and con-

sent of the Senate in advance, and it was so asked by President Treaties. Polk upon the ratification of the Treaty with Great Britain, in 1846, relative to Oregon. See 5 Marshall's Life of Washington, ch. 2, p. 223; Executive Journal, 11th Aug. 1790, pp. 60, 61; Rawle's Const. ch. 7, pp. 63, 64; Story's Const. § 1523; see Senate Journal and Debates of July, 1846, upon the Oregon Treaty.

"MAKE TREATIES."—[*Fœdus*.] An agreement between two or more independent States. Brande. An agreement, league, or contract between two or more nations or sovereigns, formally signed by commissioners properly authorized, and solemnly ratified by the several sovereigns, or the supreme power of each State. Webster's Dic., TREATY; Burrill's Dic., TREATY. See Halleck's International Law, ch. 34, pp. 189, 844.

A treaty is, in its nature, a contract between two nations; not a legislative act. It does not generally effect, of itself, the object to be accomplished, especially so far as its operation infra-territorial, but is carried into execution by the sovereign power of the respective parties to the instrument. Foster & Elam v. Neilson, 2 Peters, 314.

In the United States a different principle is established. Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, wherever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the court. Id.

The power extends to every kind of treaty. Story's Const. § 1508. But the power cannot be exercised to override other parts of the Constitution, and to destroy the fundamental principles of the government. Id.; Woodeson's Elem. of Jurisprudence, 31; 4 Jeff's Corresp. 2, 3, 498; Rawle's Const. 63-75. See the power discussed. Story's Const. § 1508, 1523; Ware v. Hylton, 3 Dall. 272-276.

179. "HE SHALL NOMINATE."—The word as here used means to recommend, in writing to the Senate, the name of an appointee for confirmation. It is in this form the "advice of the Senate" is asked. This is the sole act of the President, and is voluntary. Marbury v. Madison, 1 Cr. 137; 1 Peter's Cond. 270; Story's Const. § 1548.

But the practice, when the Senate is not in session (and I think sometimes when it is), is, that the President fills vacancies, and the appointee qualifies and enters upon the duties of his office. In such cases, the NOMINATION is not confined to the PROVISIONAL appointee; but the President *may* and often *does* appoint another. See Stanbery on appointments to office. 14-19.

"AND BY AND WITH THE ADVICE AND CONSENT OF THE SENATE SHALL APPOINT."—It will be observed that, as in the nomination, the duty is imperative—"shall nominate," "shall appoint."

This power to fill vacancies is in the President, with the assent of the Senate, whilst that body is in session, and in the President alone when the Senate is not in session. There is no reason upon

199.

199.
240.Define
nominate?
184.

Appoint?

Vacancy. which the power to fill a vacancy can be limited by the state of things when it first occurred. On the contrary, the only inquiry is as to the state of things when it is filled.

What is the effect of an appointment during the recess? All admit that whenever there is a vacancy existing during the session, whether it first occurred in the recess or after the session began, the power to fill requires the concurrent action of the President and Senate. It seems a necessary corollary to this, that where the vacancy exists in the recess, whether it first occurred in the recess or in the preceding session, the power to fill is in the President alone. If, during the recess, the power is not in the President, it is nowhere, and there is a time when for a season the President is required to see that the laws are executed, and yet denied every means provided for their execution. Stanbery.

189.

What is the effect of the confirmation?

Nevertheless, it comes back to the point that the President can only "appoint," with the concurrence of the Senate; and all the appointments whether during the recess, or the session of the Senate are provisional only, and subject to the concurrence, in common parlance, "ratification," of that body.

What powers can the President confer?

Hence his power at all times to vacate offices and to fill vacancies. He can, by his own act, do every thing but give full title to his appointees, and invest them with the right to hold during the official term. *That* he cannot do without the consent of the Senate; but such is his power over officers, that, after the Senate has consented to his nomination, or in common parlance, has confirmed it, the nominee is not yet fully appointed, or even entitled to the office, for it still remains with the President to give him a commission or to refuse it, as he may deem best; and without the commission there is no appointment. This was held by the Supreme Court in *Marbury v. Madison*, 1 Cr. 137, 155, 156; and when to that decision we add the doctrine recognized by the same court in *Ex parte Hennen*, (13 Pet. 213), we see how fully the appointment and removal of officers is held to be a necessary incident of executive power. Stanbery, 18, 19.

The nomination and appointment are voluntary acts, and distinct from the commissioning. *Marbury v. Madison*, 1 Cr. 155-6. Even after confirmation, the President may, in his discretion, withhold a commission; and, until a commission has been signed, the appointment is not fully consummated. (4 Opin. 218). Stanbery.

What is the effect of the commission?

184.

When the Senate has concurred and the "commission" is signed by the President, even before delivery, the appointment is complete, and the officer has vested legal rights which cannot be resumed. *Marbury v. Madison*, 1 Cr. 156; *United States v. Le Baron*, 19 How. 74; *Story's Const.* § 1548-1554. Mr. Jefferson refused to act upon this decision, and claimed the power to withhold the commission. 4 *Jeff. Corr.* 75, 317, 372; *Rawle on the Const.* 166; *Story's Const.* § 1553, note 1.

To "appoint," and to "commission," are not one and the same thing. *Marbury v. Madison*, 1 Cr. 155. The commission is not necessarily the appointment, although conclusive evidence of the fact. *Id.*; *United States v. Le Baron*, 19 How. 74.

When the appointee refuses to accept, the successor is nominated in his place, and not in the place of the person who had been pre-

viously in the office and had created a vacancy. (*Marbury v. Madison*, 1 Cr. 137-156.) Story's Const. § 1554. See also *Johnson v. United States*, 5 Mason, 425, 438, 439; *United States v. Kirkpatrick*, 4 Wheat. 733, 734; *Bowerbank v. Morris*, Wallace Cir. R. 425, 438, 439; *Thompson's Case*, 3 P. Will. 194; *Boucher v. Wiseman*, Cro. Eliz. 440; *Burch v. Maypowder*, 1 Vt. 400.

421,
422.

180. "AMBASSADORS, OTHER PUBLIC MINISTERS, AND CONSULS." What is an —"AMBASSADORS," comprehend the highest grade only of public Ambassa-
ministers. Story's Const. § 1525. See Grotius, Vattel, Martens, dor?
Wicquefort, Halleck (ch. 9, pp. 200-239) and Wheaton, Title, 202.
AMBASSADORS. For a better definition, see note 202.

Ambassadors could not include consuls, hence the enlargement of the enumeration. Story's Const. § 1525; *Federalist*, No. 42.

See *ante*, p. 14, Art. IX.

181. "PUBLIC MINISTERS AND CONSULS."—CONSULS.—For the 189.
derivation of the word consul (*consulere*, *consulatus*, *comes*, *comi-* Define con-
tatus), see Co. Litt. lib. 3, note 20; *Burrill's Law Dic.*, CONSUL. suls?
The name of a chief magistrate among the Romans, and of Earls, from *consulendo*, among the Britons. Bract. fol. 5, b. ; 1 Bl. Com. 227. For the origin, history, and duty of consuls, see Halleck's *International Law*, ch. 15, 239-269, and the many learned authorities there cited.

In commercial and international law, a public agent, appointed by a government to reside in a foreign country (and usually in seaports), to watch over its own commercial rights and privileges, and the commercial interests of its citizens or subjects. 1 Kent's Com. 41.

182. "JUDGES OF THE SUPREME COURT, AND ALL OTHER OFFICERS OF THE UNITED STATES, WHOSE APPOINTMENTS ARE NOT HEREIN OTHERWISE PROVIDED FOR, AND WHICH SHALL BE ESTABLISHED BY LAW." What off-
cers can
the Presi-
dent
appoint?
179.

Judges of the Supreme Court are defined in the Constitution. (Art. III. sec. 1.)

The effect of this and other clauses of the Constitution, on the subject of the appointments to office, is to declare that all offices under the federal government, except in cases where the Constitution itself may otherwise provide, shall be established by law. *United States v. Maurice*, 2 Brock. 96.

Every thing concerning the administration of justice, or the general interests of society may be supposed to be within the meaning of the Constitution, especially if fees and emoluments are annexed to the office. But there are matters of temporary and local concern, which, although comprehended in the term officers, have not been thought to be embraced by the Constitution. (*Lehman v. Sutherland*, 3 Serg. Rawle, 149.) Attorney-General Stanbery's Opinion on the Reconstruction Laws, 24th May, 1867, p. 12.

183. "BUT THE CONGRESS MAY VEST BY LAW THE APPOINTMENT, ETC., OF INFERIOR OFFICERS IN THE PRESIDENT ALONE, IN THE COURTS OF LAW, OR IN THE HEADS OF DEPARTMENTS."—Here Where else
may the
appointing
power be
vested?

179-182. the duty of commissioning is distinct from the appointment. The legislature might require commissions. *Marbury v. Madison*, 1 Cr. 157; *Story's Const.* § 1548.

Officers commissioned? Clerks of courts are such officers; and, in such cases, the power of removal is incident to the power of appointment. *Ex parte Hennen*, 13 Pet. 230, 259. And may be exercised by the court which appointed. *Id.*

The President cannot appoint a commissioner of bail, affidavits, &c. That power belongs to the circuit courts. *Bates*, 24th June, 1861.

Tenure of office?

Can the President remove as well as appoint?

179, 180.

184. THE POWER OF REMOVAL. The power of the President to appoint to office, necessarily includes the power to remove all officers appointed and commissioned by him, where the Constitution has not otherwise provided. Therefore he may remove a territorial judge, in his discretion. 5 *Opin.* 283; 3 *Id.* 673; 4 *Id.* 603, 608-9; 4 *Elliot's Debates*, 350; *Ex parte Hennen*, 13 Pet. 259. And he may cause a military officer to be stricken from the rolls, without a trial by court-martial, notwithstanding a decision in his favor by a court of inquiry. 4 *Opin.* 1.; 2 *Story's Const.* § 1538; *Stanbery*, 17-19. But see act of 13th July, 1866, in this note; *Story's Const.* § 1549-1554.

To what is the Senate's action confined.

193, 194.

The Senate cannot originate an appointment; its constitutional action is confined to a simple affirmation or rejection of the President's nominations; and such nominations fail whenever it disagrees to them. 3 *Opin.* 188; *Stanbery*, 18.

This clause gives him power to appoint diplomatic agents of any rank, at any place, and at any time, in his discretion, subject to the approbation of the Senate; and this power cannot be limited by act of Congress. 7 *Opin.* 186.

185. Nothing is said about the power of removal by the executive of any officers whomsoever. As, however, the tenure of office of no officers except those in the judicial department, is, by the Constitution, provided to be during good behavior, it follows, by irresistible inference, that all others must hold their offices during pleasure, unless Congress shall have given some other duration to their office. (1 *Lloyd's Debates*, 511, 512.) *Story's Const.* § 1537; *Keenan v. Perry*, 24 Tex. 258. In the absence of a constitutional or statutory provision, the power of removal would seem to be incident to the power of appointment. (*Ex parte Hennen*, 13 Pet. 259.) *Keenan v. Perry*, 24 Tex. 258.

Art. III., Sec. 1.

184.

As far as Congress constitutionally possesses the power to regulate and delegate the appointment of "inferior officers," so far they may prescribe the term of office, the manner in which, and the persons by whom, the removal, as well as the appointment to office, shall be made. (*Marbury v. Madison*, 1 *Cranch*, 137, 155.) *Story's Const.* § 1537. See *Monroe's Message* of 12th April, 1822, 1 *Executive Journal*, 286; *Sergt's Const.* ch. 29 [31]; 5 *Marshall's Life of Washington*, ch. 3, p. 196-200; 1 *Lloyd's Debates*, 351-366, and 450-600; *Id.* 1-12.

The removal takes place in virtue of the new appointment, by mere operation of law. *Ex parte Hennen*, 13 Pet. 300; *Federalist*, No. 77.

"The consent of the Senate would be necessary to displace as well as to appoint." (Federalist, No. 77.) Story's Const. § 1540. 421,
424.

While Mr. Madison claimed the power to remove, he said, "the wanton removal of meritorious officers would subject him (the President) to impeachment." (1 Lloyd's Debates, 503; and see Id. 351, 366, 450, 480-600; 4 Elliot's Debates, 141-207. 191-194.

The first limitation on the President's power of removal is as follows: "And no officer in the military or naval service shall, in time of peace, be dismissed from service except upon, and in pursuance of, the sentence of a court-martial to that effect, or in commutation thereof." Act of 13th July, 1866, 14 St. p. 92, § 5. How are the
military re-
moved?

In the differences between the President and Congress, the question was again discussed by the thirty-ninth Congress; and although not very elaborately argued, the positions taken for and against the power were urged, and will be found in the Congressional Globe of that session, and in the President's veto of the following law:—

An Act regulating the Tenure of certain Civil Offices.

"SEC. 1. Every person holding any civil office to which he has been appointed by and with the advice and consent of the Senate, and every person who shall hereafter be appointed to any such office, and shall become duly qualified to act therein, is, and shall be entitled to hold such office until a successor shall have been in like manner appointed and duly qualified, except as herein otherwise provided: *Provided*, That the Secretaries of State, of the Treasury, of War, of the Navy, and of the Interior, the Postmaster-General, and the Attorney-General, shall hold their offices respectively for and during the term of the President, by whom they may have been appointed, and for one month thereafter, subject to removal by and with the advice and consent of the Senate." Act of
March 2,
1867, 14 St.
430.
What is
tenure of
civil
officers?
With what
exceptions?
Omitted.

"2. When any officer appointed as aforesaid, excepting judges of the United States Courts, shall, during a recess of the Senate, be shown, by evidence satisfactory to the President, to be guilty of misconduct in office, or crime, or for any reason shall become incapable or legally disqualified to perform its duties, in such case, and in no other, the President may suspend such officer and designate some suitable person to perform temporarily the duties of such office until the next meeting of the Senate, and until the case shall be acted upon by the Senate, and such person so designated shall take the oaths and give the bonds required by law to be taken and given by the person duly appointed to fill such office; and in such case it shall be the duty of the President, within twenty days after the first day of such next meeting of the Senate, to report to the Senate such suspension, with the evidence and reasons for his action in the case, and the name of the person so designated to perform the duties of such office. And if the Senate shall concur in such suspension, and advise and consent to the removal of such officer, they shall so certify to the President, who may thereupon remove such officer, and, by and with the advice and consent of the Senate, appoint another person to such office. But if the Senate shall refuse to concur in such suspension, such officer so suspended shall forthwith resume the functions of When may
the Presi-
dent sus-
pend and
temporarily
appoint?

30.
To whom to
report?

If the
Senate
refuse to
concur?

426. his office, and the powers of the person so performing its duties in his stead shall cease, and the official salary and emoluments of such officer shall, during such suspension, belong to the person so performing the duties thereof, and not to the officer so suspended: *Provided, however,* That the President, in case he shall become satisfied that such suspension was made on insufficient grounds, shall be authorized, at any time before reporting such suspension to the Senate as above provided, to revoke such suspension and reinstate such officer in the performance of the duties of his office.

May the President revoke the removal?

If the Senate refuse to concur in vacancies?

"3. The President shall have power to fill all vacancies which may happen during the recess of the Senate, by reason of death or resignation, by granting commissions which shall expire at the end of their next session thereafter. And if no appointment, by and with the advice and consent of the Senate, shall be made to such office so vacant or temporarily filled as aforesaid during such next session of the Senate, such office shall remain in abeyance, without any salary, fees, or emoluments attached thereto, until the same shall be filled by appointment thereto, by and with the advice and consent of the Senate; and during such time all the powers and duties belonging to such office shall be exercised by such other officer as may by law exercise such powers and duties in case of a vacancy in such office.

What limit on term?

"4. Nothing in this act contained shall be construed to extend the term of any office the duration of which is limited by law.

What penalty for accepting or exercising office contrary to this act?

"5. If any person shall, contrary to the provisions of this act, accept any appointment to, or employment in, any office, or shall hold or exercise, or attempt to hold or exercise, any such office or employment, he shall be deemed, and is hereby declared to be, guilty of a high misdemeanor, and, upon trial and conviction thereof, he shall be punished therefor by a fine not exceeding ten thousand dollars, or by imprisonment not exceeding five years, or both said punishments, in the discretion of the court.

And for removal, &c., contrary to the act?

"6. Every removal, appointment, or employment, made, had, or exercised, contrary to the provisions of this act, and the making, signing, sealing, countersigning, or issuing of any commission or letter of authority for or in respect to any such appointment or employment, shall be deemed, and are hereby declared to be, high misdemeanors, and, upon trial and conviction thereof, every person guilty thereof shall be punished by a fine not exceeding ten thousand dollars, or by imprisonment not exceeding five years, or both said punishments, in the discretion of the court: *Provided,* That the President shall have power to make out and deliver, after the adjournment of the Senate, commissions for all officers whose appointment shall have been advised and consented to by the Senate.

When may the President commission?

How are rejections to be certified?

"7. It shall be the duty of the secretary of the Senate, at the close of each session thereof, to deliver to the Secretary of the Treasury, and to each of his assistants, and to each of the auditors, and to each of the comptrollers in the treasury, and to the treasurer, and to the register of the treasury, a full and complete list, duly certified, of all the persons who shall have been nominated to and rejected by the Senate during such session, and a like list of

all the offices to which nominations shall have been made and not confirmed and filled at such session. 426.

"8. Whenever the President shall, without the advice and consent of the Senate, designate, authorize, or employ any person to perform the duties of any office, he shall forthwith notify the Secretary of the Treasury thereof; and it shall be the duty of the Secretary of the Treasury thereupon to communicate such notice to all the proper accounting and disbursing officers of his department. What is the duty of the Secretary in such case?

"9. No money shall be paid or received from the treasury, or paid or received from or retained out of any public moneys or funds of the United States, whether in the treasury or not, to or by or for the benefit of any person appointed to or authorized to act in or holding or exercising the duties or functions of any office contrary to the provisions of this act; nor shall any claim, account, voucher, order, certificate, warrant, or other instrument, providing for or relating to such payment, receipt, or retention, be presented, passed, allowed, approved, certified, or paid by any officer of the United States, or by any person exercising the functions or performing the duties of any office or place of trust under the United States, for or in respect to such office, or the exercising or performing the functions or duties thereof; and every person who shall violate any of the provisions of this section shall be deemed guilty of a high misdemeanor, and, upon trial or conviction thereof, shall be punished therefor by a fine not exceeding ten thousand dollars, or by imprisonment not exceeding ten years, or both said punishments, in the discretion of the court." Passed over the President's veto, 2 March, 1867. What restrictions as to pay? What penalty for violation? 14 Stats. 430.

See the Debates in 1789, on the question Whether the heads of departments were "inferior officers?" 1 Lloyd's Debates, 480-600; 2 Id. 1-12. The result of the debate seems to have been that they were not. (Rawle's Const. ch. 14, pp. 163, 164; Sergeant on the Const. ch. 29 [ch. 31]; see President Monroe's Message of 12th April, 1822.) Story's Const. § 1536-1539. The President was overruled by the Senate, which contended that, as Congress possessed the power to make rules and regulations for the land and naval forces, they had a right to make any which would promote the public service; that Congress fixes the promotions, and every promotion is a new appointment, which requires ratification. (Sergeant's Const. ch. 29) [ch. 31.] Are the Cabinet inferior officers?

The power to *nominate* does not naturally or necessarily include the power to remove; and if the power to appoint does include it, then the latter belongs conjointly to the executive and Senate. Story's Const. § 1538. It results, and is not separable from the appointment itself. (*Ex parte Hennen*, 13 Pet. 213.) Story's Const. § 1538; Federalist, No. 77. 431. 191.

The power to remove by the President was affirmed during the administration of President Washington by the casting vote of the Vice-President. Senate Journal, July 18, 1789, p. 42. The question was much agitated again during the administration of President Jackson. Finally the power has been denied, in the shape of the tenure of office bill, during the administration of 179.

421, 426. President Johnson, because of the peculiar attitudes of a President and a Congress elected at the same time, and upon the same platform of principles. Without pretending to assert positively the constitutionality of the law, the editor ventures to predict, that no political party will ever entirely remove the restrictions, and leave the tenure of office wholly and exclusively at the will of the President. The real evil results from the too great patronage in the hands of the executive, and the corrupting influences, for a long time so openly employed, by the distribution of federal patronage to control State elections. The evil could only be reached and Presidential elections rendered peaceful and safe by an organic change, which would place the choice of federal magistrates where the constitutions of the States have generally placed them—in the hands of the people. If time has demonstrated that the elective democratic principle may be left to the wisdom of choice, why could not the rule apply to many grades of federal officers?

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What is the power to fill vacancies?

184, § 3.

[3.] The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session.

If the vacancies occur during the session?

184.

425,

426

25.

32.

185. "ALL VACANCIES THAT MAY HAPPEN DURING THE RECESS OF THE SENATE."—Mr. Wirt, in 1823, Mr. Taney, in 1832, and Mr. Legaré, in 1841, concur in opinion that vacancies first occurring *during* the session of the Senate may be filled by the President *in* the recess. Mr. Mason, in a short opinion given in 1845, held that vacancies *known to exist* during the session could not be filled *in* the recess; but in a more elaborate opinion, written in 1846, he expresses general concurrence with his three predecessors. All these concurring opinions give a construction to the meaning of the words; and they agree that these words are not to be confined to vacancies which first occur *during* the recess, but may apply to vacancies which first occur *during* the session and continue in the recess. Attorney-General Stanbery on the President's power in the matter of appointments to office, 30th Aug. 1866, 12 Op. 32.

449, 455. How may the vacancy occur?

179.

148.

What means "that may happen"?

1. The vacancy may not have become known during the recess; 2. It may have occurred by the failure of the Senate to act upon a nomination; 3. Or, upon a nomination and confirmation, where the party so nominated and confirmed refuses in the recess to accept the office; 4. Or by the rejection of the nominee of the President in the last hour of the session; 5. Or by the failure of the President to make a nomination during the session or after a rejection of his nominee. Id.

The subject-matter is a *vacancy*. It implies duration—a condition or state of things which may exist. I incline to think, upon the mere words, that we might construe them precisely as if the phrase were, "If it happen that there is a vacancy in the recess," or, "If a vacancy happen to exist in the recess." Id. 5, 6.

But if the office first occur during the recess; or if it be created during the session and the President fail to appoint, he cannot appoint during the recess. The word "HAPPEN" has relation to some casualty, not provided for by law. (The appointment of the Ministers to Ghent, in 1813; Senate Journal of 20th April, 1822; 2 Executive Journal, pp. 415, 500; 3 Executive Journal, 297.) Story's Const. § 1559. 423.

He may fill, during a recess of the Senate, a vacancy that occurred by expiration of commission during a previous session. 1 Opin. 631. So he may fill a vacancy which has occurred by the expiration of a former temporary appointment, the Senate having neglected to act on a nomination to fill the office. 3 Id. 673; 4 Id. 523; 2 Id. 525; 4 Id. 361.

186. "WHICH SHALL EXPIRE AT THE END OF THE SESSION."—Length of the commission of an officer appointed during a recess, who is afterward nominated and rejected, is not thereby determined: it continues in force until the end of the next session, unless sooner determined by the President. 2 Opin. 336; 4 Id. 30. commission?

It was upon this state of facts that Mr. Taney gave his opinion in 1832, and held on this point that "the vacancy did take place in the recess," and that "the former appointment continued during the session, and there was no vacancy until after they adjourned." Stanbery on filling vacancies, 6. What means "which shall expire at the end of the session"?

184.

If the President appoint and commission, both expire at the end of the next session. If he nominate the same person, and the Senate concur, it is a new appointment; and the bond given "to fill up the vacancy," does not apply to acts done under the new appointment and commission (United States v. Kirkpatrick, 9 Wheat. 720, 733, 734, 735.) Story's Const. § 1538.

SEC. III.—He shall, from time to time, give to the Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient. He may, on extraordinary occasions, convene both houses, or either of them; and in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper. He shall receive ambassadors and other public ministers. He shall take care that the laws be faithfully executed, and shall commission all the officers of the United States. What are the duties enjoined upon the President? Further powers?

187. "GIVE INFORMATION OF THE STATE OF THE UNION, AND RECOMMEND," &c.—The opening messages of Presidents Washington and John Adams were delivered in person and answered. 1 Benton's Cond. Debates; Story's Const. 3d ed. § 1561, note 1. See How are the opinions given?

Authorities. 1 Tuck. Bl. Com. 343-345; Federalist, No. 78; Rawle's Const. ch. 16, p. 171.

The practice was changed by President Jefferson; and ever since all messages have been delivered in writing. This "information of the state of the Union," embraces the reports of all the departments, and altogether they constitute what are called the executive documents of the government, which are valuable repositories for statesmen and students. Calls are often made by Congress on the President and the heads of departments, for information on special matters.

Have extra sessions been called?

188. "MAY CALL CONGRESS TOGETHER AND ADJOURN," &c.—This power of convening Congress in extra session, has been frequently exercised, both in regard to Congress and the Senate. Never could the necessity of the power be more forcibly demonstrated than upon the occasion of its exercise by President Lincoln, in April, 1863. See Federalist, No. 78; Rawle's Const., ch. 16, p. 171.

It is not remembered that the occasion ever has arisen for the President to exercise the power to adjourn Congress.

What does "ambassadors and other public ministers" embrace?
180, 181,
202.

The power to receive AMBASSADORS AND OTHER PUBLIC MINISTERS carries along the power to receive consuls, and they never act without *exequaturs*. Rawle's Const. ch. 24, pp. 224, 225. Story's Const. § 1564-1572. See Federalist, No. 42; 1 Kent's Com. Lect. 2, pp. 40-44. Halleck's International Law, p. 242, § 4; Fynn, British Consuls abroad, pp. 34-55; 2 Phillimore on International Law, § 246, 258.

In case of a revolution, or dismemberment of a nation, the judiciary cannot take notice of any new government or sovereignty, until it has been duly recognized by some other department of the government, to whom the power is constitutionally confided. (United States v. Palmer, 3 Wheat. 610, 634, 643; Hays v. Gelston, 3 Wheat. 246, 323, 324; Rose v. Himley, 4 Cr. 441; the Divina Pastora, 4 Wheat. 52, and note 65; the Nuestra Señora de la Caridad, 4 Wheat. 497.) Story's Const. § 1566.

What is the duty of the President to see the laws executed?

204.

189. "HE SHALL TAKE CARE THAT THE LAWS BE FAITHFULLY EXECUTED."—That is, to execute the laws to the extent of the defensive means placed in his hands. 9 Op. 524.

The Supreme Court of the United States cannot enjoin the President from seeing the laws faithfully executed. Mississippi v. Johnson, 4 Wallace, 498. Where an executive officer is clothed with discretion, the act to be done is executive, and beyond judicial control. (Marbury v. Madison, 1 Cranch, 137; Kendall, Postmaster-General v. Stockton and Stokes, 12 Pet. 527.) Id.; The State v. The Southern P. R. R. 24 Tex. 117; Paschal's Annotated Digest, note 191.

174, 175.

It is of the very essence of executive power, that it should always and everywhere be capable of, and be in, full exercise. There shall be no cessation—no interval of time when there may be an incapacity of action. Stanbery on filling vacancies, 8, 9.

Under this power the governor (the President) ought to order suits in all cases where the laws are infringed and the rights of the government invaded. The State v. Delesdenier, 7 Tex. 95.

190. "SHALL COMMISSION ALL OFFICERS."—This seems to be 185, 185. more properly connected with the appointing of officers; but it is not one and the same thing. *Marbury v. Madison*, 1 Cr. 156-7; Story's Const. § 1548.

As incident to this power, he has authority to appoint commis- What are the President's powers?
sioners and agents to make investigations required by acts or resolutions of Congress; but cannot pay them, except from an appropriation for that purpose. 4 Opin. 248. It is not, in general, judicious for him, in the exercise of this power, to interfere in the functions of subordinate officers, further than to remove them for any neglect or abuse of their official trust. 3 Id. 287. But where combinations exist among the citizens of one of the States, to obstruct or defeat the execution of acts of Congress, and the question of the constitutionality of such laws is made in suits against a marshal of the United States, the President is justified in assuming his defense on behalf of the United States. 6 Id. 220, 500.

The various acts of President Lincoln, in calling out the militia, organizing an army, and proclaiming a blockade of the Southern ports, in April, 1861, for the suppression of the rebellion, were approved, ratified, and confirmed by a joint resolution of Congress, in August, 1861. The President was the judge of his powers, and the court is bound by his acts. *The Prize Cases*, 2 Black, 666.

SEC. IV.—The President, Vice-President, and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors. 310, 319-327.

191. "CIVIL OFFICERS."—The remedy is strictly confined to 27, 39, 40. civil officers, in contradistinction to military. Story's Const. § 690, 691.

A senator or representative in Congress is not such civil officer. Who are civil officers?
Blount's Trial, 22, 102; *Wh. St. Tr.* 260, 316; 1 Story's Const. § 793, 802. See 2d vol. *Senate Journal* (1797), 383-393. Nor is a territorial judge, not being a constitutional, but a legislative office p. 181.
only. 3 Opin. 409. But United States circuit and district judges 431.
are subject to impeachment. *Peck's Trial*, 20, and *Chase's Trial*.

No previous statute is necessary to authorize an impeachment Where must we look for definitions?
for any official misconduct. What are, and what are not high crimes and misdemeanors, is to be ascertained by a recurrence to the rules of the common law. 1 Story's Const. § 799. *Peck's Trial*, 499. For the rules of proceedings prescribed in cases of impeachment, see *Peck's Trial*, 56-9.

Blount was expelled as a senator for a "high misdemeanor;" but the Senate refused to consider him a "civil officer," liable to "impeachment." See 2 *Senate Journal*, pp. 383-397. The "high misdemeanor," was not in the violation of any particular statute. What is an impeachment by the common law?

"An impeachment before the Lords by the Commons in Great Britain, in Parliament, is a prosecution of the *already known and established law*, and has been frequently put in practice, being a law?"

- 27, 39, 177. presentment to the most high and supreme court of criminal jurisdiction by the most solemn grand inquest of the whole kingdom" (4 Blackstone, 259); and when this most high and supreme court of criminal jurisdiction is assembled for the trial of a person impeached for a violation of the "already known and established law," it must proceed according to the known and established law, for although "the trial must vary in external ceremony, it differs not in essentials from criminal prosecutions before inferior courts. The same rules of evidence, the same legal notions of crimes and punishments prevail." (Woodeson, vol. 2, 611.) Minority report on the Impeachment of the President, 62. See 2 Chase's Trial, 137; Rawle's Const. 204.

What must
the treason
be against?
215.

192. "TREASON AND BRIBERY."—TREASON against the United States shall consist only in levying war against them or in adhering to their enemies, giving them aid and comfort. Art. 3, sec. 3. The treason must be against the United States. (Rawle's Const. ch. 22, p. 215.) Story's Const. § 802.

BRIBERY is the offense of taking any undue reward by a judge, juror, or other person concerned in the administration of justice, or by a public officer, to influence his behavior in his office, (4 Black. Com. 139, and Chitty's note; 3 Inst. 145; 4 Burr, 2494; 1 Russel on Crimes, 154.) Burrill's Law Dic., BRIBERY.

For what
must it be
defined?

For this definition resort must necessarily be had to the common law. Story's Const. § 796; Peck's Trial.

No other *crimes* than bribery and treason can regularly be inquired into as ground of impeachment. Rawle's Const. ch. 22, p. 215. But neither this point, nor whether any other than a public officer can be impeached, has been authoritatively settled. Story's Const. § 802, 803.

Define high
crimes?
27, 39, 194,
212, 223.

193. "HIGH CRIMES."—Crime or misdemeanor is an act committed, or omitted, in violation of a public law, either forbidding or commanding it. 4 Bl. Com. 5. This general definition comprehends both crimes and misdemeanors. *Id.* Crime, in a narrower sense, is distinguished from a misdemeanor, as being an offense of a deeper and more atrocious dye, and usually amounting to a felony. 4 Bl. Com. 5; Burrill's Law Dic., CRIME; Minority report on the Impeachment of the President, 61. A breach or violation of some public right or duty to a whole community, considered as a community, in its social aggregate capacity; as distinguished from civil injury. 4 Bl. 5.

The violation of a right, when considered in reference to the evil tendency of such violation, as regards the community at large. 4 Stephen's Com. 55; 1 *Id.* 127, 128. In this sense it includes misdemeanors. Burrill's Law Dic., CRIME.

Define mis-
demeanor?
27, 39, 192,
193.

194. "MISDEMEANOR" is a less heinous species of crime; an indictable offense not amounting to felony. 4 Bl. Com. by Chitty, 5 note; Burrill's Law Dic., MISDEMEANOR. Properly speaking, crime and misdemeanor are synonymous. *Id.*; 4 Steph. Com. 57.

In general a *misdemeanor* is used in contradistinction to *felony*, and comprehends all indictable offenses which do not amount to felony; as perjury, battery, libels, conspiracies, attempts and so-

licitations to commit felonies, &c. 4 Bl. Com. notes 5, 6; Paschal's **Misdemeanor.** Annotated Digest, 1658-1660.

The case of Judge Humphries, at the commencement of the rebellion, was upon charges of disloyal acts and utterances, some of which clearly did not set forth offenses indictable by statute of the United States, and yet upon all those charges, with one exception only, he was convicted and removed. Report upon the Impeachment of the President, 52, 53. The minority say that they amounted to treason, because he advised secession by Tennessee, after the ordinance by South Carolina and the levying war by that State. Id. 68.

It has been insisted that none but an offense against a statute of the United States is impeachable. (1 Chase's Trial, 9-18, 47, 48; 4 Elliot's Debates, 262; Rawle's Const. ch. 29, p. 273.) Story's Const. § 796; Minority Report on the Impeachment of the President, 61. **Must the offense be against a statute? 192.**

Where any offense is punishable by an act of Congress, it ought to be impeachable. Story's Const. § 796. **327.**

So political offenses, impeachable at common law, may be so classified. Id. § 764, 763, 797, 798, 799; Jefferson's Manual, § 53, title, IMPEACHMENT; Blount's Trial, 29-31, 75-80; Farrar, § 494-496; Curtis' Com. p. 360.

No one of the cases yet tried rests upon statutable misdemeanors. Story's Const. § 799; Report upon the Impeachment of the President, pp. 51-53.

For the English parliamentary cases, see 2 Woodeson's Law Lect. 40, p. 602; Comyn's Dig. *Parliament*, 28-40; Story's Const. § 800.

Mr. Madison said: "He (the President) will be impeachable by this House, before the Senate, for such an act of maladministration; the wanton removal of meritorious officers would subject him to impeachment and removal from his high trust." (Lloyd's Debates, 503, 351, 450; 4 Elliot's Debates, 141.) Farrar's Const. § 495, 496. **What were Madison's views? 184-186.**

Whether offenses not connected with office are impeachable is still unsettled. Story's Const. § 803-805.

While this work was running through the press, a majority of the judiciary committee (on the 25th November, 1867) made a report to the House of Representatives (in response to a resolution of the House), wherein they impeached ANDREW JOHNSON, President of the United States, of "High crimes and misdemeanors." The report was signed by five members; the minority, including the chairman, dissented. The report is long, and the evidence is voluminous. **State the history of the President's impeachment?**

The committee did not charge the violation of any criminal statute. The charges are sundry usurpations of congressional power; willful efforts to defeat the work of reconstruction in the rebel States, and the encouragement of those who were engaged in the rebellion. All the charges hinge upon this one point. But, in the specifications, there are sundry charges of the violation of statute law: particularly in using money appropriated for other purposes to support the President's own reconstruction measures; in levying taxes; using United States property; restoring abandoned and captured property; ordering the dispersal of the Louisi-

327. ana Convention ; and conspiracies with and pardons of prominent rebels, and appointing them to office. See Report, 1-47, 55-59.
- State the legal argument of the minority? 143. It is urged by the minority of the committee, that an impeachment will only lie for offenses which are indictable ; that the house is to impeach for offenses, not to create them ; that nothing is penal except crimes (13 Encyc. Brit. 275) ; that Blackstone's definition of municipal law (1 Bl. Com. 44) is to be observed ; that no *ex post facto* law shall be passed ; that the definitions of crime (the same stated in this note) are to control ; that, in the trial, the Senate, like the House of Lords, is a high criminal court, governed by the same rules of law and evidence as other criminal courts ; that the fact that the party can be convicted in another court proves this (2 Chase's Trial, 137) ; that they must be "*crimes*," such as are entitled to jury-trial (Art. III. Sec. 2) ; that Blount's trial was for crimes (but against what criminal law is not shown) ; that while Pickering's offense may not have been criminal, the plea of insanity was ignored, and the case is a disreputable precedent ; that Chase must have been acquitted because mere misconduct as a judge was not a crime or misdemeanor. In Blount's case,
212. several of the charges were proved. They were ; "With intending to carry into effect a hostile expedition in favor of the English against the Spanish possessions of Louisiana and Florida ; with attempts to engage the Creek and Cherokee Indians in the same expedition ; with having alienated the affections of the said Indians from Ben. Hawkins, an agent of the United States among the Indians, the better to answer his said purposes ; with having seduced James Cary, an interpreter of the United States among the Indians, for the purpose of assisting in his criminal intentions ; and with having attempted to diminish the confidence of the Cherokee Indians in relation to the boundary line, which had been run in consequence of the treaty which had been held between the United States and the said Indians." (1 Annals of 5 Cong. 499, 919.) That the plea to the jurisdiction was sustained, on the ground that Blount was not a civil officer. (Id. 2318, 2319.) That while Peck was only arraigned for misconduct, or official misbehavior, he did not *demur* to the charge, but affirmed the justice of his action ; that if the point, that a judge may be tried for want of "good behavior," may be admitted, it cannot apply to the President, whose tenure is for four years ; that the charges against Humphries were of treason, because they were words and acts *after* the levying of war by South Carolina ; that a fair review of the English cases shows that Parliament rested all cases upon some indictable offense, though it is admitted that definitions have been strained ; fifty-five cases given by Hatsell are named (p. 71) ; where the effort to explain fails, the precedents are boldly attacked ; the current of precedents is cited to show that the federal courts can only entertain jurisdiction of crimes, defined and made penal by Congress (United States v. Hudson, 7 Cr. 32 ; United States v. Coolidge, 1 Wheat. 415 ; *Ex parte* Bollman and Swartwout, 4 Cr. 95 ; United States v. Lancaster, 2 McLean, 33, and various others, 77, 78) ; that the same principle should apply to the high court of impeachment ; that "other high crimes and misdemeanors," means such as may be declared by the law-making power of the United
49. 197. 217.

States, (Rawle's Const. 265); and the rest of the report is principally devoted to the facts. Report upon Impeachment of the President, 64-78. The whole argument is, that the impeachment must be for treason within the constitutional definition; for bribery within the then common-law definition; or if for other high crimes and misdemeanors, then they must be such as are created by some penal enactment of Congress; and not such as existed at, and were impeachable by, the common law. The majority of the committee assume that high crimes and misdemeanors may consist in oppressive, unjust, corrupt, and unauthorized official misconduct, although not indictable. It is not within the plan of this work to give the conclusions of the author, derived from the same class of reading. This hour of the country's history is not fortunate for a calm investigation. If we admit the conclusions of the minority report, the difficulty is only removed; for still the question would remain—which of the statute offenses would be the subject of impeachment? Shall they be piracy, homicide, larceny, forgery, counterfeiting, robbery, defalcations, or any one of the hundred felonies and misdemeanors spread over the statutes? And shall they be confined to offenses committed within the criminal jurisdiction of the United States? Such only are indictable. Or may an impeachment be for an infamous crime against the laws of a foreign country?

The question being now afloat upon the sea of public opinion, he can only hope that future writers may have more satisfactory guides. The house by a large majority sustained the minority report and refused to impeach, but still it can hardly be regarded as settling the principle, that nothing is impeachable except what is indictable as an offense against the United States.

ARTICLE III.

SEC. 1.—The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may, from time to time, ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior; and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

Define the
judicial
power?

Tenure of
office?
194.

Compensa-
tion?

195. "THE JUDICIAL POWER OF THE UNITED STATES."—*Ju-* Define judi-
dicialis, *judex*, a judge, or *judicium*, a judgment. Burrill's Law cial power?
Dic., JUDICIAL. It is the power to hear and determine controver- s, 210, 218.
sies between litigants, upon proper cases of law and fact presented
for adjudication.

The object was to establish a judiciary for the United States, a necessary department, which did not exist under the Confedera- What was
tion. (Federalist, Nos. 22, 23, 80, 81; 2 Wilson's Law Lect. ch. 3, the object?
p. 201; 3 Elliot's Debates, 142, 143; Osborn v. United States

435-438. Bank, 9 Wheat. 818, 819; 1 Kent's Com. Lect. 14, pp. 290-297.) Story's Const. § 1574; Montesquieu's Spirit of Laws, b. 11, ch. 6; Rawle's Const. ch. 21, p. 199. Chisholm v. Georgia, Dall. 419, 474. For the great necessity and duties of a national judiciary, also see Cohens v. Virginia, 6 Wheat. 384-390; Id. 402-404, 415; Marbury v. Madison, 1 Cr. 137; Curtis' Commentaries, § 2. With jurisdiction to the full extent of the Constitution, laws, and treaties of the United States. Osborn v. United States Bank, 9 Wheat. 819; Martin v. Hunter, 1 Wheat. 328.

How is the power contradistinguished from the law?

JUDICIAL POWER, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law and can will nothing. Their discretion is a mere legal discretion. Judicial power is never exercised for the purpose of giving effect to the will of the judge; but always of the legislature or will of the law. Osborn v. Bank of United States, 9 Wheat. 818, 819, 866; 1 Kent's Com. Lect. 14, p. 277; 3 Story's Const. § 1574, note 3 of 3d edition. But must regard the Constitution as paramount. Marbury v. Madison, 1 Cr. 173; 1 Kent's Com. Lect. 20, pp. 448, 460; Cohens v. Virginia, 6 Wheat. 414.

238.

On what does the jurisdiction depend?
210, 211.

The jurisdiction of the courts of the United States depends exclusively on the Constitution and laws of the United States. Livingston v. Jefferson, 1 Brock. 203; American Insurance Co. v. Canter, 1 Pet. 511; 1 Curtis' Com. § 4; United States v. Drenner, Hemp. 320; United States v. Alberti, Id. 444. The federal courts have the right to determine their own jurisdiction. (The United States v. Peters, 5 Cr. 115; The United States v. Booth, 21 How. 506.) Freeman v. Howe, 24 How. 459-461.

Define "shall be vested?"
211.

"SHALL BE VESTED" is mandatory upon the legislature. Its obligatory force is so imperative, that Congress could not, without a violation of its duty, have refused to carry it into operation. Martin v. Hunter, 1 Wheat. 304, 328-337; 1 Kent's Com. Lect. 14, pp. 290-293. Congress can only VEST the power in courts created by itself. Id.; Story's Const. § 1501-1503. The words afford an absolute grant of judicial power. Id.; Story's Const. § 1594.

State the divisions of power?
141, 165.
199.

All legislative power *shall be vested* in a Congress; all executive power in a President; all judicial power *shall be* (not may be) *vested* in one Supreme Court and in such inferior courts, &c. These powers are thus absolutely vested, and it is the duty of Congress to vest the *whole judicial* power. (Martin v. Hunter, 1 Wheat. 304, 337.) Story's Const. § 1590, 1591; 1 Kent's Com. Lect. 11, p. 221. And yet it cannot be denied that the *duty* of Congress to *vest* the whole judicial power, by proper legislation, is one thing; and the *power* to enforce that duty through any other department of the government, or to exercise it until distributed by legislation, is another.—[EDITOR.]

What is the Supreme Court?
210, 211.

"IN ONE SUPREME COURT."—SUPREME, here means the highest national tribunal, with both original and appellate jurisdiction. But this can only have original jurisdiction in two classes of cases; those affecting ambassadors, &c.; and where a State is a party. (Martin v. Hunter, 1 Wheat. 304, 337.) Story's Const. § 1593. Congress cannot vest any portion of the power in State courts, only in courts established by itself.

196. "SUCH INFERIOR COURTS"—Congress, having the power State the to establish inferior courts, must, as a necessary consequence, have power over the right to define their respective jurisdictions. *Sheldon v. Sill*, 8 inferior courts? How. 448-9; *Osborn v. United States Bank*, 9 Wh. 738; *Turner* 194, 195. v. *Bank of North America*, 4 Dallas, 10; *McIntyre v. Wood*, 7 Cr. 506; *Kendall v. United States*, 12 Pet. 616; *Cary v. Curtis*, 3 How. 245.

Therefore, "INFERIOR COURTS" HAVE TO BE ORDAINED AND Why ESTABLISHED in order that the whole "judicial power" may be inferior exercised. (*Martin v. Hunter*, 3 Cr. 316.) Story's Const. § courts? 1593.

Congress has the exclusive power of legislating over the terri- 231, 232. tories, and consequently the Supreme Court has appellate jurisdic- tion over the courts established therein. (*Benner v. Porter*, 9 How. 235, 236.) *Freeborn v. Smith*, 2 Wall. 173. And see *Ameri- can Insurance Co. v. Canter*, 1 Pet. 511; *Hunt v. Palao*, 4 How. 589; *Benner v. Porter*, 9 How. 244, as to the character of territo- rial courts.

The commissioners of the Circuit Courts of the United States are What are officers exercising functions of justices of the peace under the commis- laws of the commonwealth. *Sim's Case*, 7 Cush. 731. Congress sioners? might appoint justices, without commissioning them as judges, 224, 235. 197, 198. during good behavior, or giving them fixed salaries. Id. 194.

197. "THE JUDGES BOTH OF THE SUPREME AND INFERIOR Define good COURTS SHALL HOLD THEIR OFFICES DURING GOOD BEHAVIOR."— behavior? The meaning of this is for life or until impeachment, unless, 191-194. indeed, there be power to abolish circuits and districts, and thus 40. to dispense with supernumerary or objectionable incumbents.

For a full note of the State Constitutions, as to tenure, see 1 Kent's Com. 11th edition, p. 295, note (a.)

The territorial judges are not of this class, as they only hold four years. (*American Insurance Co. v. Canter*, 1 Pet. 546.) *Benner v. Porter*, 9 How. 244.

JUDGES FOR A TERM OF YEARS.—Courts in which the judges hold What are their offices for a specific number of years, are not constitutional constitutional courts, in which the judicial powers conferred by the Constitution courts? can be deposited. *American Ins. Co. v. Canter*, 1 Pet. 511, 546. The Supreme Court of the United States was last organized Give the as follows:—Allotment, &c., of the Judges of the Supreme Court of allotment the United States, as made April 8, 1867, under the Acts of Con- gress of July 23, 1866, and March 2, 1867.

NAME OF THE JUDGE, AND STATE WHENCE COMING.	NUMBER AND TERRITORY OF THE CIRCUIT.	DATE AND AUTHOR OF THE JUDGE'S COMMI- SSION.	436.
CHIEF-JUSTICE. HON. S. P. CHASE, Ohio.	FOURTH. MARYLAND, WEST VIRGINIA, VIRGIN- IA, NORTH CARO- LINA, AND SOUTH CAROLINA.	1864. December 6th. PRESIDENT LINCOLN.	

NAME OF THE JUDGE, AND STATE WHENCE COMING.	NUMBER AND TERRITORY OF THE CIRCUIT.	DATE AND AUTHOR OF THE JUDGE'S COMMISSION.
ASSOCIATES.	FIFTH.	1835.
HON. JAMES M. WAYNE, Georgia.	GEORGIA, FLORIDA, ALABAMA, MISSIS- SIPPI, LOUISIANA, AND TEXAS.	January 9th. PRESIDENT JACKSON.
HON. SAM'L NEL- SON, New York.	SECOND.	1845.
	NEW YORK, VER- MONT, AND CON- NECTICUT.	February 14th. PRESIDENT TYLER.
HON. R. C. GRIER, Pennsylvania.	THIRD.	1846.
	PENNSYLVANIA, NEW JERSEY, AND DEL- AWARE.	August 4th. PRESIDENT POLK.
HON. N. CLIFFORD, Maine.	FIRST.	1858.
	MAINE, NEW HAMP- SHIRE, MASSACHU- SETTS, AND RHODE ISLAND.	January 12th. PREST. BUCHANAN.
HON. NOAH H. SWAYNE, Ohio.	SIXTH.	1862.
	OHIO, MICHIGAN, KENTUCKY, AND TENNESSEE.	January 24th. PRESIDENT LINCOLN.
HON. S. F. MILLER, Iowa.	EIGHTH.	1862.
	MINNESOTA, IOWA, MISSOURI, KANSAS, AND ARKANSAS.	July 16th. PRESIDENT LINCOLN.
HON. DAV. DAVIS, Illinois.	SEVENTH.	1862.
	INDIANA, ILLINOIS, AND WISCONSIN.	December 8th. PRESIDENT LINCOLN.
HON. S. J. FIELD, California.	NINTH.	1863.
	CALIFORNIA, OREGON, AND NEVADA.	March 10th. PRESIDENT LINCOLN.

HENRY STANBERY, of Kentucky, Attorney-General; DANIEL WESLEY MIDDLETON, of the District of Columbia, Clerk; R. C. PARSONS, of Ohio, Marshal.

The following have been Chief-Justices of the Supreme Court of the United States:—

	Name.	Term of Service.	Born.	Died.
Give a list of the Judges? 436.	John Jay, N. Y.....	1789-1795	.. 1745	.. 1829
	John Rutledge, S. C.....	1795-1795	.. ....	.. 1800
	Oliver Ellsworth, Conn.....	1796-1801	.. 1752	.. 1807
	John Marshall, Va.....	1801-1835	.. 1755	.. 1835
	Roger B. Taney, Md.....	1836-1864	.. 1777	.. 1864
	Salmon P. Chase, O.....	1864-....	.. 1809	.. ....

The following have been Associate Justices:—

Name.	Term of Service.	Born.	Died.
John Rutledge, S. C.....	1789-1791	..	1800
William Cushing, Mass.....	1789-1810	..	1810
James Wilson, Penn.....	1789-1798	..	1798
John Blair, Va.....	1789-1796	..	1800
Robert H. Harrison, Md.....	1789-1789	..	1790
James Iredell, N. C.....	1790-1799	..	1799
Thomas Johnson, Md.....	1791-1793	..	1819
William Paterson, N. J.....	1793-1806	..	1806
Samuel Chase, Md.....	1796-1811	..	1811
Bushrod Washington, Va.....	1798-1829	..	1829
Alfred Moore, N. C.....	1799-1804	..	1810
William Johnson, S. C.....	1804-1834	..	1834
Brockholst Livingston, N. Y....	1806-1823	..	1823
Thomas Todd, Ky.....	1807-1826	..	1826
Joseph Story, Mass.....	1811-1845	..	1845
Gabriel Duvall, Md.....	1811-1835	..	1844
Smith Thompson, N. Y.....	1823-1845	..	1845
Robert Trimble, Ky.....	1826-1829	..	1829
John McLean, Ohio.....	1829-1861	..	1861
Henry Baldwin, Penn.....	1830-1846	..	1846
James M. Wayne, Ga.....	1835-1867	..	1867
Philip P. Barbour, Va.....	1836-1841	..	1841
John Catron, Tenn.....	1837-1865	..	1865
John McKinley, Ala.....	1837-1852	..	1852
Peter V. Daniel, Va.....	1841-1860	..	1860
Samuel Nelson, N. Y.....	1845-....	..	1792
Levi Woodbury, N. H.....	1845-1851	..	1790
Robert C. Grier, Penn.....	1846-....	..	1794
Benjamin R. Curtis, Mass.....	1851-1857	..	1809
James A. Campbell, Ala.....	1853-1861	..	1802
Nathan Clifford, Me.....	1858-....	..	1803
Noah H. Swayne, Ohio.....	1862-....	..	1805
Samuel F. Miller, Iowa.....	1862-....	..	1816
David Davis, Illinois.....	1862-....	..	1815
Stephen J. Field, California.....	1863-....	..	1817

Efforts were made at the Supreme Court clerk's office, and at the State Department, to obtain more accurate information as to the respective dates of service, but without success.

198. The "COMPENSATION" of Judges is at present as follows: Chief-Justice, six thousand five hundred dollars; Associate Justices, six thousand dollars each. 10 Stat. 655; Brightly's Dig. 819. The District Judges' salaries vary from three thousand five hundred dollars to five thousand five hundred dollars. 436.

This compensation prohibits the imposition of a tax upon a judge's salary. *Commonwealth v. Mann*, 5 W. & S. 415. Congress may give the Circuit Court original jurisdiction in any case to which the appellate jurisdiction extends. (*Osborn v. The Bank of the United States*, 9 Wh. 821.) *Jones v. Seward*, 41 Barb. 272-3.

State the present compensation?

Can it be taxed?

And see *United States v. Bevens*, 3 Wheat. 336. When the Act of Congress directs the transfer of the case, we have nothing to do with the validity of the law as a defense to the action. (Story's Const. ch. 38, § 903, 906, *et seq.*; *Martin v. Hunter*, 1 Wh. 304; *Cohens v. Virginia*, 6 Wh. 364; *Osborn v. The Bank of the United States*, 9 Wh. 738.) *Jones v. Seward*, 41 Barb. 273. As to what cases will be transferred from the State to the federal court, see 1 Brightly's Dig. Laws U. S. p. 128. § 19, notes *d, e, g, and h*; *Smith v. Rines*, 2 Sumn. 338; *Wilson v. Blodget*, 4 McLean, 363; *Hubbard v. The Northern R. R. Co.* 25 Vt. 715, 719; *Welch v. Tenent*, 4 Cal. 203; *Ladd v. Tudor*, 3 W. & M. 325. No suit can be removed in which a State is a party. *New Jersey v. Babcock*, 4 Wash. C. C. 344. After the proper steps for removal, any subsequent proceedings in the State courts are illegal. *Gordon v. Longest*, 16 Pet. 97; 1 *Kent's Com.* 295.

To what
does the
judicial
power
extend?
199-200.

439-455.

SEC. II.—[1.] The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State, claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens or subjects.

Distinguish
the judicial
from legisla-
tive power?
14, 71, 138,
165, 211.

439, 440.

27, 39, 40.

283.

199. JUDICIAL POWER, as contradistinguished from legislative power and executive power, is the power to hear and determine all the cases of law and fact, which arise between the government and parties, or between parties, under this Constitution, the law of nations, and the laws and treaties of the United States, which shall be legally brought within the cognizance and jurisdiction of any of the courts or judicial tribunals established under the Constitution. It was intended to be a separate department of the government, possessing all the "judicial power" of the national government except upon the single jurisdiction of impeachment. Not a power to control the other departments of the government in their official actions, but to act independently of them under the Constitution and laws.

But the judicial power does not extend to all *questions* which arise under the Constitution, laws, and treaties, because many of

these are political, and have to be solved by other departments of the government. Thus:—

“TREATIES.”—Where the title to property depended on the question, whether the land was within a cession by treaty to the United States, after our government, legislative and executive, had claimed jurisdiction over it, the courts must consider that question as a political one, the decision of which having been made in this manner, they must conform to it. (*Foster v. Neilson*, 2 Pet. 309; *United States v. Arredondo*, 6 Pet. 711, 712; *Garcia v. Lee*, 12 Pet. 520, 521; *Williamson v. Suffolk Ins. Co.*, 13 Pet. 441, 441. 920.) *Luther v. Borden*, 7 How. 56.

So the protection of the Indians in their possessions seems to be a political question. (*Cherokee Nation v. Georgia*, 5 Pet. 20.) *Id.* As to the Indians? 91-92.

So as to State boundaries, unless agreed to be settled, as a judicial question. (*Rhode Island v. Massachusetts*, 12 Pet. 736, 738; *Garcia v. Lee*. *Id.* 520.) *Id.* And they have agreed upon this court to settle such questions. *Rhode Island v. Massachusetts*, 12 Pet. 737. And so of foreign treaties, as to confiscations. (*Barclay v. Russel*, 3 Ves. 424, 434.) *Id.* And generally as to political State boundaries? 195.

treaties. (*Carnatic v. The East India Company*, 2 Ves. jr. 56.) *Luther v. Borden*, 7 How. 56. So as to which must be regarded as the rightful government abroad between two contending parties, is never settled by the judiciary, but is left to the general government. (*The Cherokee Nation v. Georgia*, 5 Pet. 50; *Williams v. Suffolk Ins. Co.* 13 Pet. 419; *Rose v. Himley*, 4 Cr. 241; *United States v. Palmer*, 3 Wheat. 634; *Gilston v. Hoyt*, *Id.* 246; *The Divina Pastora*, 4 Wheat. 64.) *Luther v. Borden*, 7 How. 56, 57. As to revolutions? 274.

The same rule has been applied in a contest as to which is the true Constitution, between two, or which possesses the true legislative power in one of our own States. (*Scott v. Jones*, 5 How. 374.) *Luther v. Borden*, 7 How. 57. 233, 235.

Congress is the legislative department of the government; the President is the executive department. Neither can be restrained in its action by the judicial department; though the acts of both, when performed, are, in proper cases, subject to its cognizance. *Mississippi v. Johnson*, 4 Wall. 500. 110. 195.

A CASE arises, within the meaning of the Constitution, whenever any question respecting the Constitution, laws, or treaties of the United States, has assumed such a form, that the judicial power is capable of acting on it. (*Osborn v. United States Bank*, 9 Wh. 819; *Jones v. Seward*, 41 Barb. 272; *Curtis' Com.* § 7; *Ex parte Milligan*, 4 Wallace, 112, 114. Law, in this article, and COMMON LAW, in the seventh amendment, mean the same thing; that is, not merely *suits* which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined in contradistinction to those where equitable rights are administered. (*Parsons v. Bedford*, 3 Pet. 447.) *Fenn v. Holmes*, 21 How. 486 (cites *Strother v. Lucas*, 6 Pet. 768; *Parish v. Ellis*, 16 Pet. 453-4; and *Bennett v. Butterworth*, 11 How. 669). And see *Sheirburne v. De Cordova*, 24 How. 423. Or, where the proceeding is in the admiralty. *Parsons v. Bedford*, 3 Pet. 447; *Robinson v. Campbell*, 3 Wh. 212. The Define a case? 140, 141. 198, 210. 263, 264. 201.

A case.

action of ejectment, or trespass to try title, cannot be supported on the common-law side of the United States Court, upon the inchoate titles recognized by the State statutes. *Fenn v. Holmes*, 21 How. 481; *Hooper v. Scheimer*, 23 Id. 249; *Sheirburne v. De Cordova*, 24 Id. 423.

This class of cases is without reference to who are the parties. *Curtis' Com.* § 3-17. See *Van Ness v. Packard*, 2 Pet. 137, 144; *Wheaton v. Peters*, 8 Pet. 591; *Terrett v. Taylor*, 9 Cr. 43; *Town of Pawlet v. Clarke*, Id. 292.

When considered?

But a "CASE" can only be considered when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. (*Osborn v. Bank of the United States*, 9 Wh. 819.) *Curtis' Com.* § 7. And see *Robinson v. Campbell*, 2 Wh. 212, 221, 223; *Parsons v. Bedford*, 3 Pet. 433, 446, 447. That is, there must be a judicial proceeding. *Curtis' Com.* § 10, 11; *Osborn v. Bank of United States*, 9 Wheat. 738, 819, 821.

The record must show that the Constitution or some law or treaty was drawn in question. (*Lawter v. Walker*, 12 How. 149; *Mills v. Brown*, 16 Pet. 525.) *Railroad Co. v. Rock*, 4 Wall. 180.

And under the 25th section of the judiciary act, the decision must be against the validity of the act, treaty, or Constitution; not in favor of it. *Ryan v. Thomas*, 4 Wall., 604.

Define a case in equity?
199.

200. BY "CASES IN EQUITY," are to be understood suits in which relief is sought according to the principles and practice of the equity jurisdiction as established in English jurisprudence. *Robinson v. Campbell*, 3 Wh. 222-3; *United States v. Howland*, 4 Id. 108; *Lanman v. Clark*, 2 McLean, 570-1; *Lanman v. Clark*, 4 Id. 18; *Gordon v. Hobart*, 2 Sumn. 401; *Pratt v. Northam*, 5 Mas. 95; *Cropper v. Coburn*, 2 *Curtis' C. C.* 465. And see 1 *Curtis' Com.* § 7-9, 19a-30. The true test of equity jurisdiction is, whether there is a plain, adequate, and complete remedy at law in the same courts. *United States v. Howland*, 4 Wheat. 108; *Boyce's Executors v. Grundy*, 3 Pet. 210, 215; *Gould v. Gould*, 3 Story R. 516, 536; *Gaines v. Chew*, 2 How. 619, 645; *Williams v. Benedict*, 8 How. 107; *Curtis' Com.* § 23-38. Not according to the practice of the State courts, but the distinctions in England. *Robinson v. Campbell*, 3 Wheat. 222, 223.

What is the true test of equity jurisdiction?

When does a case arise?

201. A CASE is said to "ARISE" under the Constitution or laws of the United States, whenever its correct decision depends on the construction of either. *Cohens v. Virginia*, 6 Wh. 379. A bill in equity to enforce a specific performance of a contract to convey a patent, is not a "case arising under the laws of the United States" as to patents, so as alone to give jurisdiction to its Courts. *Nesmith v. Calvert*, 1 W. & M. 34. A case in admiralty, is not a case arising under the Constitution, but the jurisdiction is as old as admiralty itself. *The Amer. Ins. Co. v. Canter*, 1 Pet. 545. This article is reconcilable with the 5th amendment, and the several judiciary acts on the subject of trial by jury. *Parsons v. Bedford*, 3 Pet. 444; *Story's Const.* § 1645; *Chisholm v. Georgia*, 2 Dall. 419, 433, 437; S. C., 635, 640, 642.

What is a case?

A "CASE" is a controversy between parties which has taken a

10 Chig.
Leg. News 107
10 How. 100
4 Blatch. 68
1 Cliff. 298
255-259.

shape for judicial decision. Marshall's speech, 5 Wheat. App. 16, 17; *Osborn v. Bank of United States*, 9 Wheat. 819. A CASE is a suit in law or equity, instituted according to a regular course of judicial proceedings; and when it involves any question arising under the Constitution, treaties, or laws of the United States, it is within the judicial power confided to the Union. (See 1 Tuck. Black. Com. 418-420; Madison's Virginia resolutions and report, January, 1800, p. 28; *Marbury v. Madison*, 1 Cr. 137, 173, 174; *Owing v. Norwood*, 5 Cr. 344; 2 Elliot's Debates, 418, 419; *Martin v. Hunter*, 1 Wheat. 304; *Cohens v. Virginia*, 6 Wheat. 264, 378-392.) Story's Const. § 1647-1656. It consists of the right of the one party as well as the other. *Cohens v. Virginia*, 6 Wheat. 379.

202. "IN ALL CASES AFFECTING AMBASSADORS, OTHER PUBLIC MINISTERS AND CONSULS."—These classes are usually distinguished in diplomacy:—1. AMBASSADORS, who are the highest order, who are considered as personally representing their sovereigns; 2. ENVOYS EXTRAORDINARY AND MINISTERS PLENIPOTENTIARY; 3. MINISTERS RESIDENT, AND MINISTERS CHARGÉ D'AFFAIRES. Mere chargés d'affaires are deemed of still lower rank. Dr. Liebers Encyc. Am. Art. MINISTERS, FOREIGN: Vattel, B. 4 chap. 6, § 71-74. And see *Schooner Exchange v. McFadden*, 7 Cr. 116, 138; Story's Const. § 1658, 3d ed. 494, note 1. Whatever their rank and grade public ministers of every class are the immediate representatives of their sovereigns. Id.

The federal courts have jurisdiction of all suits "affecting" public ministers, although they may not be parties to the record. *Osborn v. United States Bank*, 9 Wh. 854-5. See *United States v. Ortega*, 11 Wh. 467; *United States v. Ravara*, 2 Dall; 297, S. C., 4 Wash. C. C. 531. The recognition of the executive of the United States is conclusive as to the public character of the party. *Dupont v. Pichon*, 4 Dall. 321; *United States v. Ortega*, 4 Wash. C. C. 531; *Curtis' Com.* § 31-35; Story's Const. § 1660-1662, notes to 3d ed.

203. "ADMIRALTY AND MARITIME JURISDICTION."—The cases are:—1. Captures made *jure belli* upon certain waters, and all questions of prize and other incidents arising therefrom; 2. Crimes and offenses against the laws of the United States committed upon the same waters; 3. Civil acts, torts, and injuries committed upon the same waters not under claim or color of exercising the rights of war, as assaults and personal injuries; collisions of ships, illegal seizures, or depredations upon property; illegal dispossession of ships, seizures for breaches of revenue laws, and salvage services. *Curtis' Com.* § 37; and see same, § 38-52; Marshall's Speech, 5 Wheat. App. 16; *Martin v. Hunter*, 1 Wheat. 335; Story's Const. § 1666, 1669, 3d ed., note 1; *Abbott on Shipping*, P. 2, chap. 4, pp. 132-138, and notes to American editions; 1 Kent's Com. Lect. XVII., pp. 342-352, and notes. But the torts must be upon the navigable waters, and not partly on land. (*Thomas v. Lane*, 2 Sumner, 9; *The Huntress*, Davies, 85; *United States v. McGill*, 1 Wash. C. C. 463; s. c., 4 Dall. 346; *Plumer v. Webb*, 4 Mas. 383, 384.) *The Plymouth*, 3 Wall. 333, 334.

How far
does the
jurisdiction
extend?

The Admiralty clause embraces what was known and understood in the United States, as the admiralty and maritime jurisdiction, at the time when the Constitution was adopted. *Genesee Chief v. Fitzhugh*, 12 How. 443; *New Jersey Steam Navigation Co. v. Merchants' Bank*, 6 Id. 244; *Waring v. Clark*, 8 Id. 441; *Tunno v. The Betsina*, 5 Am. L. R., 408; *The Huntress*, Davies, 83. And also extends the power so as to cover every expansion of jurisdiction. *Waring v. Clarke*, 5 How. 458.

Why was
maritime
used?

The word "maritime" was added to guard against any narrow interpretation of the preceding word "admiralty." Story's Const. § 1666. In *Hine v. Trevor*, 4 Wall. 561-569, Mr. Justice Miller reviewed the steamboat *Thomas Jefferson*, 10 Wh. 428; *The steamboat Orleans*, 11 Pet. 175; *Warring v. Clark*, 8 How. 441; *The Genesee Chief*, 12 How. 457 (which overruled the first two); *Fritz v. Bull*, 12 How; *The Moses Taylor*, 4 Wall. 411; The statute of 1845, 5 St. 726; of 1789, 1 St. 77, and deduced the following rules:—

What was
the extent
and division
of admiralty
jurisdiction?

1. The admiralty jurisdiction is not limited to tide water, but covers the entire navigable waters of the United States; 2. The original jurisdiction in admiralty, exercised by the district courts, by virtue of the act of 1789, is exclusive, not only of the federal courts, but of the State courts also; 3. The jurisdiction of admiralty causes arising on the interior waters of the United States, other than the lakes and their connecting waters, is conferred by the Act of September 24th, 1789; 4. The admiralty jurisdiction exercised by the same courts, on the lakes, and the waters connecting those lakes, is governed by the Act of 3d February, 1845; 5. The Acts of the State legislatures, which virtually give admiralty remedies on the navigable rivers, are unconstitutional and void. 4 Wall. 569.

Since the case of the *Genesee Chief* (12 How. 457), navigable waters may be substituted for tide-waters. *The Plymouth*, 3 Wall. 34.

Enumerate
some of the
cases?

The jurisdiction of the admiralty courts in this country, at the time of the Revolution, and for a century before, was more extensive than the high court of admiralty in England. Paschal's Annotated Digest, note 89; *The Genesee Chief*, 12 How. 455. This jurisdiction extends to the navigable lakes and rivers of the United States, without regard to the ebb and flow of the tides of the ocean. *Genesee Chief v. Fitzhugh*, 12 How. 443. It embraces all maritime contracts, wheresoever the same may be made or executed, and whatever may be the form of the stipulations; and also all torts and injuries committed upon waters within its jurisdiction. *De Lovio v. Boit*, 2 Gall. 398; *Gloucester Ins. Co. v. Younger*, 2 Curt. C. C. 322; *Philadelphia & Havre de Grace Towboat Co. v. Philadelphia, Wilmington & Baltimore Railroad Co.* 5 Am. L. R. 280. All crimes and offenses against the laws of the United States. *Corfield v. Coryell*, 4 Wash. C. C. 371; *United States v. Bevans*, 3 Wh. 336. And all cases of seizures for breaches of the revenue laws, and those made in the exercise of the rights of war. *The Vengeance*, 3 Dall. 297; *The Sally*, 2 Cr. 406; *The New Jersey Steam Navigation Co. v. Merchants' Bank*, 6 How. 344. Another class of cases, in which jurisdiction has

always been exercised by the admiralty courts in this country, but which is denied in England, are suits by ship-carpenters and material-men, for repairs and necessities made and furnished to ships, whether foreign, or in the port of a State to which they do not belong, or in the home port, if the municipal laws give a lien for the work and materials. *Gardner v. The New Jersey*, 1 Pet. Adm. 227; *Stevens v. The Sandwich*, Id. 233, n.; *Zane v. The Brig President*, 4 Wash. C. C. 453; *The Ship Robert Fulton*, 1 Paine, 620; *Davis v. A New Brig, Gilp*. 473; *The General Smith*, 4 Wh. 438; *Wick v. The Samuel Strong*, 6 McLean, 590; *Curtis' Com.* § 36-52. Increase of jurisdiction. 446.

The jurisdiction extends to the seizure of cotton upon rivers in the States in rebellion. *Mrs. Alexander's Cotton*, 2 Wall. 419. But cotton seized upon land could not be the subject of lawful prize, although it was subject to capture, notwithstanding it was private property. Id.

204. "CONTROVERSIES TO WHICH THE UNITED STATES SHALL BE A PARTY."—1. The jurisdiction is not conferred upon any particular court; Congress must therefore designate the tribunal; 2. Cognizance is not given of all controversies, but only of some; 3. "Controversies" seem to embrace only civil suits. *Cohens v. Virginia*, 6 Wheat. 264, 411, 412; *Story's Const.* § 1674-1681; *Curtis' Com.* § 56, 57. Where is the jurisdiction when the United States is a party?

The United States can only be sued in cases where it has consented to be sued by act of Congress. *Curtis' Com.* § 57; *Story's Const.* § 1677, 1678. As in suits for the confirmation of land grants and in the Court of Claims. *Curtis' Com.* § 100-102. When can the United States be sued?

A suit against the President to prevent the enforcement of the reconstruction laws, was held to be a suit against the executive of the United States, and dismissed for want of jurisdiction. *Mississippi v. Johnson*, 4 Wall. 498. *Georgia v. Stanton*, 6 Wall. 000.

205. "TO CONTROVERSIES BETWEEN TWO OR MORE STATES."—This means States of the Union.

This clause about suits between States, includes a suit brought by one State against another, to determine a question of disputed boundary. *Rhode Island v. Massachusetts*, 12 Pet. 657; *Alabama v. Georgia*, 23 How. 510. And only applies to those States that are members of the Union, and to public bodies owing obedience and conformity to its Constitution and laws. *Scott v. Jones*, 5 How. 377. And a State is within the operation of this clause only when it is a party to the record, as a plaintiff or defendant, in its political capacity. *Osborn v. United States Bank*, 9 Wheat. 738; 1 *Curtis' Com.* § 59, 63. The Cherokee nation is not a State, within the meaning of the Constitution, either foreign or domestic—nor had it the right to sue Georgia before the Supreme Court of the United States. *The Cherokee Nation v. Georgia*, 5 Pet. 1, 16-20. What may be included by a State against a State? s. 9, 223-228. 447.

As early as 1792, this court exercised original jurisdiction, without any further legislation than the act of 1789. (*Brailsford v. Georgia*, 2 Dall. 402, 415; *Oswald v. Georgia*, Dall.; *Chisholm v. Georgia*, 2 Dall. 419, 478; *New Jersey v. New York*, 5 Pet.

Upon whom should the process be served? 284; *Grayson v. Virginia*, 3 Dall. 320.) These cases settle that the process should be served upon the chief executive and attorney-general of the State. *Kentucky v. Ohio*, 24 How. 96-7. Where the governor sues or is sued, in his official capacity, it is a suit by or against the State. *Id.* 97, 99; *Governor of Georgia v. Madrazo*, 1 Pet. 110. A mandamus is an ordinary process to which a State is entitled, where it is applicable. (*Kendall v. The United States*, 12 Pet. 615; *Kendall v. Stokes*, 3 How. 100.) *Kentucky v. Ohio*, 24 How. 97-8.

For the necessity of this jurisdiction, see *Federalist*, No. 80; *Kent's Com. Lect.* 14; *Chisholm v. Georgia*, 2 Dall. 437-445; *Sergeant's Const. Introduction*, 11-16; *New York v. Connecticut*, 4 Dall. 3; *Fowler v. Lindsay*, 3 Dall. 411; 3 *Elliot's Debates*, 281; 2 *Elliot's Debates*, 418; *Penn. v. Lord Baltimore*, 1 Vesey, 444; *Story's Const.* § 80, 489, 1679-1681; 1 *Chalm. Annals*, 480-490.

The jurisdiction is a necessity to prevent a resort to the sword. *Story's Const.* § 1681. See *Ableman v. Booth*, 21 How. 506; *Curtis' Com.* 60-70.

A State obtained an injunction to prevent the construction of a bridge which would impede the navigation of the Ohio River. *Pennsylvania v. Wheeling & Belmont Bridge Co.* 13 How. 518. The 11th article of the amendments has forbidden suits by individual citizens against the States.

If the judicial power does not extend to *all* controversies between States, it excludes none. *Rhode Island v. Massachusetts*, 12 Pet. 657; *Curtis' Com.* § 60.

Its mere interest in a corporation will not oust the jurisdiction, *U. S. Bank v. Planters' Bank*, 9 Wheat. 904, 966; *Curtis' Com.* § 66. See also *Bank of the Commonwealth of Kentucky v. Wistar*, 2 Pet. 318.

It seems the court will look into the interest of the State, where it claims to be a party. *Pennsylvania v. Wheeling Bridge Co.* 13 How. 518, 539; *Curtis' Com.* § 70.

205, 203.
211, 271,
272.

448, 449.

205a. "BETWEEN A STATE AND THE CITIZENS OF ANOTHER STATE."—Before the eleventh amendment (1793), it was held, that this authorized suits to be brought *against*, as well as *by* States, where the plaintiff was a citizen of another State. *Chisholm v. Georgia*, 2 Dall. 419-478; *Cohens v. Virginia*, 6 Wheat. 406; *Curtis' Com.* § 60.

Can a citizen sue a State? 271, 272. But this power of a citizen to sue a State is removed by the eleventh amendment. For the history and object of the amendment, see *Cohens v. Virginia*, 6 Wheat. 406 *et seq.*; *Curtis' Com.* § 62. But where a State recovers a judgment against a citizen a writ of error will still lie. *Id.*; *Cohens v. Virginia*, 6 Wheat. 409.

When is a State within the rule? 271.

A State is within the operation of this original clause of the Constitution, only when it is a party to the record, as plaintiff or defendant, in its political capacity. *Osborn v. Bank of United States*, 9 Wheat. 738; *Curtis' Com.* § 63-65. *New York v. Connecticut*, 4 Dall. 3; *Story's Const.* § 1680, 1681.

Where a State is a party to the record, the question of jurisdiction is decided by inspection. *Id.*

The State is only a party when it is on the record as such.

(Fowler v. Lindsay, 3 Dall. 411, 415; S. C. 1 Pet. Com. 190, 191; Cases. New York v. Connecticut, 4 Dall. 1-6; United States v. Peters, 5 Cr. 115, 139; 1 Kent's Com. Lect. 15, p. 302.) Story's Const. § 1685.

206. "CONTROVERSIES BETWEEN CITIZENS OF DIFFERENT STATES." Controversies?
 —"CONTROVERSIES" is synonymous with civil suits. Curtis' 199-201.
 Com. § 73. It may be deduced: 1. That they are all citizens of Who are
 the United States, who are domiciliated in a State; (Scott v. Sand- citizens of a
 ford, 19 How. 393.) 2. And they are suits where one party is a State?
 citizen of one State, and the other a citizen of another. Curtis' 17, 19, 25,
 Com. § 73. The *situation* of the parties, rather than their *char-* 93, 169, 220-
acters determines the jurisdiction. *Id.* At the commencement of 222.
 the suit. Connolly v. Taylor, 2 Peters, 556, 564. What deter-

This clause does not embrace cases where one of the parties is What deter-
 a citizen of a territory, or of the District of Columbia. Hartshorn mines the
 v. Wright, Peters C. C. 64; Scott v. Jones, 5 How. 377; Hepburn jurisdiction?
 v. Elszey, 2 Cr. 445; Corporation of New Orleans v. Winter, 1 What does
 Wh. 91; Gassies v. Ballou, 6 Pet. 761; 1 Kent's Com. Lect. 17, p. citizenship
 360; Story's Const. § 1693, 1694; Curtis' Com. § 77. Citizen- mean?
 ship, when spoken of in the Constitution, in reference to the juris- 6, 18, 93,
 diction of the federal courts, means nothing more than resi- 170, 220.
 dence. Lessee of Cooper v. Galbraith, 3 Wash. C. C. 546; Gassies 274.
 v. Ballou, 6 Pet. 761; Shelton v. Tiffin, 6 How. 163; Lessee 450, 451.
 of Butler v. Farnsworth, 4 Wash. C. C. 101. But a free negro 274.
 of the African race, whose ancestors were brought to this country 274.
 and sold as slaves, is not a citizen within the meaning of the 274.
 Constitution, nor entitled to sue in that character in the federal 274.
 courts. Scott v. Sandford, 19 How. 393-4. But see the Civil 274.
 Rights Bill, note 6, p. 55; 14 St. p. 27, § 1; Paschal's Annotated 274.
 Digest, Art. 5382. A corporation created by, and transacting busi- 274.
 ness in a State, is to be deemed an inhabitant of the State, capable 274.
 of being treated as a citizen, for all purposes of suing and being 274.
 sued. Louisville R. R. Co. v. Letson, 2 How. 497; Marshall v. 274.
 Baltimore & Ohio R. R. Co. 16 Id. 314; Wheeden v. Camden & 274.
 Amboy R. R. Co. 4 Am. L. R. 296. The judiciary act confines the 274.
 jurisdiction, on the ground of citizenship, to cases where the suit 274.
 is between a citizen of a State and a citizen of another State; and, 274.
 although the Constitution gives a broader extent to the judicial 274.
 power, the actual jurisdiction of the circuit courts is governed by 274.
 the act of Congress. Moffat v. Soley, 2 Paine, 103; Hubbard v. 274.
 Northern R. R. Co. 25 Vt. 715. So, too, in the same act, there 274.
 is an exception, that where suit is brought in favor of an assignee, 274.
 there shall be no jurisdiction, unless suit could have been brought 274.
 in the courts of the United States, had no assignment been made. 274.
 This is a restriction on the jurisdiction conferred by the Constitution; 274.
 and yet this provision has been sustained by the Supreme Court 274.
 since its organization. Assignee of Brainard v. Williams, 4 Mc- 274.
 Leau, 122; Sheldon v. Sill, 8 How. 441. The Constitution has de- 274.
 fined the limits of the judicial power, but has not prescribed how 274.
 much of it shall be exercised by the circuit courts. Turner v. 274.
 Bank of North America, 4 Dall. 10; McIntyre v. Wood, 7 Cr. 506; 274.
 Kendall v. United States, 12 Pet. 616; Cary v. Curtis 3 How. 245. 274.

Only a portion.

It is well understood by those experienced in the jurisprudence of the United States, that Congress has conferred upon the federal courts but a portion of the jurisdiction contemplated by the Constitution. *Clarke v. City of Janesville*, 4 Am. L. R. 593. The plaintiffs should distinctly aver that they are citizens of different States; and in the absence of such averment, the judgment will be reversed for want of jurisdiction. (*Bingham v. Cabott*, 3 Dall. 382; *Jackson v. Ashton*, 8 Pet. 148; *Capron v. Van Noorden*, 2 Cr. 126; *Montalet v. Murray*, 4 Cr. 46.) *Scott v. Sandford*, 19 How. 420. *Curtis' Com.* § 79, note 4. But if the citizenship be denied, it should be by plea in abatement, or it should otherwise appear in the record. *Id.* See 1 *Brightly's Dig.* p. 126. sec. 17, and notes thereon. The Constitution of the Confederate States omitted this jurisdiction. *Paschal's Annotated Dig.* p. 92. In other respects it corresponded to this section and the eleventh amendment. *Id.*

How must the citizenship be averred?

The citizenship must be expressly averred, or the facts which constitute it must be set forth. (*Turner v. Bank of North America*, 4 Dall. 8; *Montalet v. Murray*, 4 Cr. 46; *Bailey v. Dozier*, 6 How. 23.) *Curtis' Com.* § 78.

See the Judiciary Act of September 24, 1789, 1 St. 78; 1 *Brightly's Digest*, p. 126 and notes.

What is the extent of the jurisdiction?

The Judiciary Act of 1789 limited jurisdiction of national courts so far as they are determined by citizenship, "to suits between a citizen of the State in which the suit is brought and a citizen of another State," and except in relation to revenue cases this limitation remains unchanged. *Ins. Co. v. Ritchie*, 5 Wall. 542. In consequence of nullification the jurisdiction was extended to "all cases in law or equity arising under the revenue laws of the United States for which other provisions have not already been made," (4 Stat. 632.) *Id.* And by this act many suits brought in the State courts were removed into the circuit courts (*Elliott v. Swartwout*, 10 Pet. 137; *Bend v. Hoyt*, 13 Pet. 267); *Ins. Co. v. Ritchie*, 5 Wall. 542. The fiftieth section of the Internal Revenue Act of 1854 extended the act of 1833 to all cases arising under the laws for the collection of internal duties. (12 Stat. 241.) *Id.* But the act of 1866 repealed the fiftieth section aforesaid, without any saving of such causes as were then pending, and said that "the act of 1833 shall not be so construed as to apply to cases arising under act of 1864," &c. This ousted jurisdiction in the causes then pending. *Id.* When the jurisdiction of a cause depends upon a statute, the repeal of which takes away the jurisdiction, or it is prohibited by a subsequent statute, it can no longer be exercised. (*Rex v. Justices of London*, 3 Burrow, 1456; *Norris v. Crocker*, 13 How. 229.) *Ins. Co. v. Ritchie*, 5 Wall. 544. But where the case would be removable under the new provision, and it is the opinion of the circuit judge that it ought to be retained, the jurisdiction is not lost. *City of Philadelphia v. Collector*, 4 Wall. 720-30.

Can a corporation be a citizen?

As respects the proof of the residence or domiciliation to constitute citizenship, see *Shelton v. Tiffin*, 6 How. 163, 185

A corporation, whose members are citizens of a different State from the other party, is a citizen of a different State. *Hope Ins.*

Co. v. Boardman, 5 Cr. 57; Bank of United States v. Devaux, 5 207, 220, 221 Cr. 61; United States v. Planters' Bank, 9 Wheat. 410; Story's Const. § 1695; Curtis' Com. § 76, 78. The doctrine is to be extended to its creation and place of business. The Commercial & Railroad Bank of Vicksburg v. Slocumb, 14 Pet. 60. 450.

207. "BETWEEN CITIZENS OF THE SAME STATE CLAIMING What is a LANDS UNDER GRANTS OF DIFFERENT STATES."—A grant of land grant? is a title emanating from the sovereignty of the soil.

Cases of grants made by different States are within the jurisdiction, notwithstanding one of the States, at the time of the first grant, was part of the other. Town of Pawlet v. Clark, 9 Cr. 292. It is the grant which passes the legal title; and if the controversy is founded upon the conflicting grants of different States, the federal courts have jurisdiction, whatever may have been the prior equitable title of the parties. Colson v. Lewis, 2 Wh. 377. Notwithstanding one State may have originally covered the territory of both. The question is, have the grants been made by different States? Id.; Curtis' Com. § 80. When are grants by different States?

208. "CONTROVERSIES BETWEEN A STATE OR THE CITIZENS THEREOF, AND FOREIGN STATES, CITIZENS, OR SUBJECTS."—This was intended to give cognizance to the federal judiciary where foreign States, or individual foreigners, are parties. See Chappelaine v. De Chenaux, 4 Cr. 306, 308; Brown v. Strode, 5 Cr. 303. 205, 205a, 211. What was the object of this provision?

An Indian tribe, or nation, within the United States, is not a "foreign State," within the meaning of this clause. Cherokee Nation v. Georgia, 5 Pet. 1. See this case for a definition of the relations of the Cherokees, as a dependent subordinate State. The very term "nation," so generally applied to them, means "a people distinct from others." Worcester v. Georgia, 6 Pet. 619. Is an Indian tribe a foreign State? 91.

209. "FOREIGN CITIZENS OR SUBJECTS."—If the party to the record be an alien, he is within this clause, whether he sue in his own right, or as trustee, if he has a substantive interest as a trustee. Chappelaine v. De Chenaux, 4 Cr. 306. And if the nominal plaintiff, although a citizen, sue for the use of an alien, who is the real party in interest, the case is within the jurisdiction. Browne v. Strode, 5 Id. 303. A foreign corporation is an alien for this purpose. Society for the Propagation of the Gospel v. Town of New Haven, 8 Wh. 464. Possibly enlarged to creation and residence. Commercial & Railroad Bank of Vicksburg v. Slocumb, 14 Pet. 60; Curtis' Com. § 81. What aliens can sue? Suppose a nominal plaintiff sue for an alien? 206, 220, 221.

The opposite party must be a citizen, and this must appear from the record. Jackson v. Twentyman, 2 Pet. 136. Is there jurisdiction where both parties are aliens?

A mere declaration of intention to become a citizen, under the naturalization laws, is not sufficient to prevent an alien from being regarded as a foreign subject, within the meaning of this clause. Baird v. Byre, 3 Wall. Jr.

An alien is a stranger born; a person born in another or foreign country, as distinguished from a native or natural born citizen or subject. In English law, born out of the allegiance or allegiance of the king. Co. Litt. § 128, 129a; 7 Co. 31; 1 Bl. Com. 366, 373; 2 Steph. Com. 426-429. In American law, 6, 18, 93, 220. Who are aliens?

274. one born out of the jurisdiction of the United States; 2 Kent's Com. 50; Burrill's Law Dic., ALIEN.

What are the rights of aliens to recover real estate? At common law an alien cannot maintain a real action or one for the recovery of real estate. (Co. Litt. 129; Shepherd's Touchstone, 204; Roscoe on Real Actions, 197; Littleton, § 198.) *White v. Sabariego*, 23 Tex. 246.

And see *Jones v. McMasters*, 20 How. 8, 20, 21; Paschal's Annotated Digest, notes 147-150, 237-240; 1168-1170a, and the numerous cases upon the rights of aliens there cited. *Lanfear v. Hunly*, 4 Wall. 209; *McDonough v. Millandon*, 3 How. 707; *Semple v. Hagar*, 4 Wall. 433, 434; 1 Daniel, ch. 53; *Bayes v. Hogg*, 1 Hayw. 485; *Orser v. Hoag*, 3 Hill, 79.

What are the aliens' rights to take and hold?

But an alien may take lands and may hold them against every person except the king, and against the king until inquisition of office. And if the alien be naturalized, before seizure by the government, the alien's title vests absolutely, and by relation relates back to the date of the purchase. *Fairfax v. Hunter*, 7 Cr. 603; *Cox v. McIlvaine*, 2 Cond. 86; *Chirac v. Chirac*, 2 Wheat. 259; *Hughes v. Edwards*, 9 Wheat. 489; *Carneal v. Banks*, 10 Wheat. 181; *Jackson v. Clarke*, 3 Wheat. 1; *Craig v. Leslie*, 3 Wheat. 563, 589; *Craig v. Radford*, 3 Wheat. 594; *Orr v. Hodgson*, 4 Wheat. 453; *Fox v. Southack*, 12 Mass. 148; *Jackson v. Adams*, 7 Wend. 376; *Jackson ex dem. Culverhouse v. Beach*, 1 John's Cases, 399; S. C. 4 Johns. 75; *Bradwell v. Weeks*, 1 Johns. 206; *Moore v. White*, 6 Johns. Chan. 360; *Cross v. De Valla*, 1 Wall. 13; *Osterman v. Baldwin*, U. S. S. C., Dec. 7, 1867; 6 Wall. 000. The annexation of Texas removed the alienage from citizens of the United States. *Osterman v. Baldwin*, 6 Wall. 000; *Cryer v. Andrews*, 11 Tex. 170-183; Paschal's Annotated Digest, notes, 148, 237, 238; *McKinney v. Sabariego*, 18 How. 239.

The disability of the alien to maintain the real action is personal, and, at common law, relates, not to the date of acquiring the property, but of bringing the suit. 1 Chitty's Pl. 470, 471; 7 Bacon's Abridgment, Tit. USES AND TRUSTS, E. 2, p. 89; 1 Id. ALIEN, D, 137; Coke Litt. 129; Id. (B. 3) p. 6; Comyn's Dig., ALIEN (C.), p. 301; *Kemp v. Kennedy*, 1 Pet. C. C. R. 40; affirmed 5 Cr. 173; 2 Cond. 223.

What is the jurisdiction of the Supreme Court?

[2] In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make.

Appellate?
456-460.

457. **210.** The Supreme Court has no original jurisdiction except in the two classes of cases mentioned in the first clause. Story's Const. § 1702. And to that extent it would seem to be exclusive. *United States v. Ravara*, 2 Dall. 297; *Marbury v. Madison*, 1 Cr. 137.

"CASES" here is applied as a generic term to all the objects designated by "case" and "controversy" in the preceding clause. *Curtis' Com.* § 83. See "case" and "controversy" defined. *Id.*; *ante*, n. 199; *Martin v. Hunter*, 1 Wheat. 304, 333; *Curtis' Com.* § 124-130. If the words "to all cases" give exclusive jurisdiction in cases affecting foreign MINISTERS, they may also give exclusive jurisdiction, if such be the will of Congress, in cases arising under the Constitution, laws, and treaties of the United States. (*Cohens v. Virginia*, 6 Wheat. 392-399.) *Story's Const.* § 1713. How is the term cases applied? 199-201.

But it does not mean that the court has jurisdiction of every "CASE" or *question* which may arise under the Constitution, laws, or treaties. These often necessarily devolve upon Congress or the executive, according as the law shall direct. (*Luther v. Borden*, 7 How. 1.) *Curtis' Com.* § 84-85*a*. The word is therefore limited to such "cases" as arise between parties, or are of a *judicatory nature*. (*Madison*, 5 *Elliot's Debates*, 483.) *Id.* § 85*a*, 100. Has the court jurisdiction of every case or question? 195.

Not to all questions by which an AMBASSADOR may be affected. *Id.* See *Stanbery's* arguments in the *Mississippi and Georgia Injunction* cases, against the President and others, reported in 4 *Wallace*. See the *United States v. Ferreira*, 13 How. 40.

"ORIGINAL JURISDICTION" is the right to take original cognizance of the case or controversy, and to hear and determine it in the first instance. It is that in which something is demanded in the first instance by the institution of process, or the commencement of a suit. *Curtis' Com.* § 107; *Story's Const.* § 1703, 1704. What is original jurisdiction?

The residue of the original jurisdiction remains to be vested by Congress in any inferior tribunals which it may see fit to create. (*Martin v. Hunter*, 1 Wheat. 304, 307; *Osborn v. The Bank of the United States*, 9 Wheat. 738, 820; *Cohens v. Virginia*, 6 Wheat. 395; *Story's Const.* § 1698.) *Curtis' Com.* § 111. Where is the residue of the original jurisdiction?

Original jurisdiction, so far as the Constitution gives a rule, is coextensive with the judicial power. (*Osborn v. Bank of United States*, 9 Wheat. 820.) *Curtis' Com.* § 159. And it would seem to follow that in cases where the Constitution itself has vested original jurisdiction in the Supreme Court, that investiture must operate as an exception to the general authority to Congress to vest original jurisdiction according to its discretion. *Id.* And there is doubt whether in such cases jurisdiction of the Supreme Court is not both original and exclusive. (*United States v. Ortega*, 11 Wheat. 467; See *Story's Const.* § 1699; 1 *Kent's Com. Lect.* XV. p. 315.) *Curtis' Com.* 160. But there are decisions the other way. *United States v. Ravara*, 2 Dall. 297; and see also *Chisholm v. Georgia*, 2 Dall. 419, 431, 436; Act of 28 Feb. 1839 (5 St. 32); *Curtis' Com.* § 161-164; *Schooner Exchange v. McFaddin*, 2 Cr. 117. What is the extent of the original jurisdiction?

Jurisdiction is the power to hear and determine a cause. It is *coram judice*, whenever a case is presented, which brings this power into action. If the petitioner states such a case in his petition, that on a demurrer, the court would render judgment in his What is jurisdiction? 195.

458. favor, it is an undoubted case of jurisdiction. (*United States v. Arredondo*, 6 Pet. 709.) *Banton v. Wilson*, 4 Tex. 403, 404.

It is the power to hear and determine the subject-matter in controversy between the parties to a suit; to adjudicate or to exercise judicial power over them, the question is, whether on a cause before a court, their action is judicial or extrajudicial; with or without authority of law to render a judgment or decree upon the rights of the litigant parties. If the law confer the power to render a judgment or decree, then the court has jurisdiction. (*Rhode Island v. Massachusetts*, 12 Pet. 718.) *Banton v. Wilson*, 4 Tex. 404.

Has a State court cognizance of consuls?

A State court has no jurisdiction of a suit against a consul; and whenever this defect of jurisdiction is suggested, the court will quash the proceeding. It is not necessary that it should be by plea before general imparlance. *Mannhardt v. Soderstrom*, 1 Binn. 138; *Davis v. Packard*, 6 Pet. 41; *Commonwealth v. Kosloff*, 5 S. & R. 545; *Griffin v. Dominguez*, 2 Duer, 656. A consul may, however, be summoned as a garnishee in an attachment from a State court. *Kidderlin v. Meyer*, 2 Miles, 242. The circuit courts have no jurisdiction of a cause in which a State is a party. *Gale v. Babcock*, 4 Wash. C. C. 199; S. C. Id. 344; *Cohens v. Virginia*, already cited. In those cases in which original jurisdiction is given to the Supreme Court, founded on the character of the parties, the judicial power of the United States cannot be exercised in its appellate form. *Osborn v. United States Bank*, 9 Wheat. 820. But if a case draws in question the laws, Constitution, or treaties of

When is there original and appellate jurisdiction?

181, 182, 202.

the United States, though a State be a party, the jurisdiction of the federal courts is appellate; for in such case the jurisdiction is founded, not upon the character of the parties, but upon the nature of the controversy. *Cohens v. Virginia*, 6 Wheat. 392; *Martin v. Hunter's Lessee*, 1 Wheat. 337. Congress has no power to confer original jurisdiction on the Supreme Court in other cases than those enumerated in this section. *Marbury v. Madison*, 1 Cr. 137; In the matter of *Metzger*, 5 How. 176, 191-2; *In re Kaine*, 14 How. 119. See 1 St. 80, § 13; 1 Brightly's Dig. 861, 862, and notes.

And it seems that the original jurisdiction is exclusive. (*Marbury v. Madison*, 1 Cr. 137.) *Curtis' Com.* § 108; *Osborn v. Bank of United States*, 9 Wheat. 738, 820, 821; *Story's Const.* § 1697-1699.

Where the character of the cause gives appellate jurisdiction, and the character of the party (as an ambassador or State) gives original jurisdiction, the appellate jurisdiction is not thereby ousted. (*Cohens v. Virginia*, 6 Wheat. 392 *et seq.*; *Martin v. Hunter*, 1 Wheat. 337.) *Curtis' Com.* § 109; *Story's Const.* § 1706-1721.

The original jurisdiction of the Supreme Court can only include cases enumerated in the Constitution. (*Marbury v. Madison*, 1 Cr. 137.)

What is appellate jurisdiction?

211. "IN ALL OTHER CASES BEFORE MENTIONED, THE SUPREME COURT SHALL HAVE APPELLATE JURISDICTION," &c.—It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not

create that cause. *Marbury v. Madison*, 1 Cr. 138; *Curtis' Com.* 459, 460. § 110, 113.

The Supreme Court possesses no appellate power in any case, unless conferred upon it by act of Congress, nor can it, when conferred, be exercised in any other mode of proceeding than that which the law prescribes. *Barry v. Mercein*, 5 How. 119. How must it be conferred?

The appellate powers are not given by the judicial act, but by the Constitution. They are limited and regulated by the judicial act, and by such other acts as have been passed upon the subject. *Durousseau v. The United States*, 6 Cr. 313. *Curtis' Com.* § 112.

Congress may prescribe the mode of exercising this appellate jurisdiction. *Marbury v. Madison*, 1 Cr. 137; *Weston v. Charleston*, 2 Pet. 449; *United States v. Hamilton*, 3 Dall. 17; *Ex parte Bollman*, 4 Cr. 75; *Ex parte Kearney*, 7 Wheat. 38; *Ex parte Crane*, 5 Pet. 190; *Story's Const.* § 1755, 1756; *Curtis' Com.* § 113.

By the 22d section of the judiciary act, the controversy must be concerning a thing of money value; the judgment must be final; and the matter in controversy must exceed the sum of two thousand dollars. By the 25th section, the right to re-examine does not depend on the money value of the thing in controversy, but upon the character of the right in dispute, and the judgment which the State court has pronounced upon it; and it is altogether immaterial whether the right in controversy can or can not be measured by a money standard. (1 St. 84-86; § 22, 25. *Barry v. Mercein*, 5 How. 120. See *Wilson v. Daniel*, 3 Dall. 401; 3 Cond. 185; *Course v. Stead*, 4 Dall. 22; 1 Cond. 217; *United States v. Brig Union*, 4 Cr. 216; 2 Cond. 91; *Smith v. Henry*, 3 Pet. 469; *Gordon v. Ogden*, Id. 33; *Hagan v. Foison*, 10 Pet. 160; *Oliver v. Alexander*, 6 Pet. 143; *Scott v. Lunt*, 6 Pet. 349; *Wallen v. Williams*, 7 Cr. 278; *Fisher v. Cockrell*, 5 Pet. 248; *Martin v. Hunter*, 1 Wheat. 304; 3 Cond. 575; *Williams v. Norris*, 12 Wheat. 117; 6 Cond. 462.) *Bank of United States v. Daniel*, 12 How. 52. *Rector v. Ashley*, U. S. C. C. Dic. T., 1867; 6 Wall. 000. What does the act require?

To give appellate jurisdiction under the 25th section, it must appear:—

First—That some one of the questions stated in the section did arise in the court below; and Secondly, that a decision was actually made thereon by the same court, in the manner required by the section. (*Shoemaker v. Randell*, 10 Pet. 394.) *McKinney v. Carroll*, 12 How. 70. What gives appellate jurisdiction?

That is, that the question was made and the decision given by the court below on the very point; or that it must have been given in order to have arrived at the judgment. (*Owings v. Norwood*, 5 Cr. 344; *Smith v. The State*, 6 Cr. 281; *Martin v. Hunter*, 5 Wheat. 305, 355; *Inglee v. Coolidge*, 4 Cond. 155; *Miller v. Nicholls*, 4 Wheat. 311, 315; 4 Cond. 465; *Williams v. Norris*, 12 Wheat. 117, 124; 6 Cond. 462; *Fisher v. Cockerill*, 5 Pet. 255, 258; *Wilson v. Blackbird Creek Marsh Company*, 2 Pet. 245; *Satterlee v. Mathewson*, 2 Pet. 380, 410; *Craig v. Missouri*, 4 Pet.

410; *Davis v Packard*, 6 Pet. 41, 48; *Mayor of New Orleans v. De Armas*, 9 Pet. 234.) *Crowell v. Randell*, 10 Pet. 394-398.

Give the
four requi-
sites?

After this full review, these propositions were stated:—1. That some one of the questions (stated in the 25th section) did arise in the State court; 2. That the question was decided by the State court as required in the same section; 3. It is not necessary that the question should appear on the record to have been raised, and the decision made in direct and positive terms *ipsissimis verbis*, but that it is sufficient if it appear by clear and necessary intendment, that the question must have been raised, and must have been decided in order to have induced the judgment. 4. That it is not sufficient to show that a question might have arisen and been applicable to the case; unless it is further shown on the record, that it did arise, and was applied by the State court in the case. *Crowell v. Randell*, 10 Pet. 398. Affirmed, *Choteam v. Marguerite*, 12 How. 510; *McKinney v. Carroll*, 12 How. 70. See *Brightly's Digest*, Tit. "ERRORS AND APPEALS," pp. 257-261, and voluminous notes thereon.

Define law
and fact?
270-272.

"LAW AND FACT."—Since the seventh amendment, Congress can not confer upon the Supreme Court authority to grant a new trial by a re-examination of the facts, and tried by a jury, except to redress errors of law. (*Parsons v. Bedford*, 3 Pet. 447, 449. See *Bank of Hamilton v. Dudley*, 2 Pet. 492). *Curtis' Com.* § 114.

What gives
the appel-
late juris-
diction?

It is the "case" and not the court which gives the appellate jurisdiction. (*Martin v. Hunter*, 1 Wheat. 394). *Curtis' Com.* § 115. Therefore, if the question or the parties give federal jurisdiction, it may be reached by appeal. *Id.*; *Cohens v. Virginia*, 6 Wh. 413. The objects of appeal, not the tribunals from which it is to be made, are alone contemplated. *Id.* 416; *Curtis' Com.* § 116. And see *Osborn v. Bank of United States*, 9 Wheat. 820, 821; *Story's Const.* § 1701.

If the objects can be attained without excluding the concurrent jurisdiction of the State courts, over cases which existed before, it would seem to be necessary to adopt such a construction as will sustain their concurrent powers. (*Teal v. Felton*, 12 How. 284, 292.) *Curtis' Com.* § 121, 123, 124. As to when original jurisdiction is exclusive, see same author, § 129-135, and *Martin v. Hunter*; *Houston v. Moore*, 5 Wheat. 1, 12.

What juris-
diction can
Congress
confer?

Congress can not confer jurisdiction upon any courts, but such as exist under the Constitution and laws of the United States, although the State courts may exercise jurisdiction in cases authorized by the laws of the State, and not prohibited by the exclusive jurisdiction of the federal courts. *Houston v. Moore*, 5 Wheat. 24-28, § 135, p. 178. And wherever the law of Congress furnishes the offense, the State law can only be enforced by the authority of Congress, or unless the power remain concurrent. *Id.*

If the jurisdiction be concurrent, the sentence of either court may be pleaded in law. *Houston v. Moore*, 5 Wheat. 40; 1 *Curtis' Com.* p. 180.

Can the
States
superadd
any thing?

Where Congress has exercised a power over a particular subject given them by the Constitution, it is not competent for State legislation to add to the provisions of Congress upon that subject.

The action by Congress seems to exclude State legislation. (Houston v. Moore, 5 Wheat. 1, 22, 23; Prigg v. Pennsylvania, 16 Pet. 608.) Story's Const. 3d ed. p. 615.

"WHERE A STATE SHALL BE A PARTY."—That is: 1. Where one State is plaintiff, and another State is defendant; 2. Where a State is plaintiff, and an individual, whether a citizen of some other State or an alien, is defendant. 3. Where a foreign State is plaintiff against one of the United States as defendant. Curtis' Com. § 153-157. See Rhode Island v. Massachusetts, 12 Pet. 657; New Jersey v. New York, 5 Pet. 283; Pennsylvania v. The Wheeling & Belmont Bridge Co. 13 Howard, 528; Cherokee Nation v. Georgia, 5 Pet. 1; *Ex parte* Juan Madrazo, 7 Pet. 627.

[3.] The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed.

212. "THE TRIAL." (L. Lat. *trialio*. *Exactissima litis contestatio*, *coram iudice, per duodecim virale exagilitio*. SPELMAN.)—The term means here, the examination before a competent tribunal, according to the laws of the land, of the facts put in issue upon the indictment or presentment, for the purpose of determining the truth of such issues. United States v. Curtis, 4 Mason, 232; Co. Litt. 124b. And see Burrill's Law Dic., TRIAL; Magna Charta, ch. 29 (9 Henry III.); 2 Inst. 45; 3 Black. Com. 379-381; 4 Black. Com. 349, 350; 2 Kent's Com. Lect. 24, pp. 1-9; 3 Elliot's Debates, 331, 339; De Lolme, B. 1, ch. 13, B. 2, ch. 16; Paley, B. 6, ch. 8; 2 Wilson's Law Lect. P. 2, ch. 6, p. 305; Story's Const. § 1778-1794.

"The trial" *per pais*, or by the country, is the trial by a jury, who are called the peers of the party accused, being of the like condition and equality in the State. (Magna Charta.) Story's Const. § 1779.

"OF ALL CRIMES EXCEPT IN CASES OF IMPEACHMENT."—See "CRIME" defined, notes 193, 194. Here it means treason, piracy, felony, or some offense against the law of nations or an act of the Congress of the United States. And this clause is to be taken subject to the exceptions, in the fifth amendment, as to trials in the land and naval service. The term "crime" here doubtless embraces misdemeanor.

In the case of the United States v. Hudson & Goodwin (7 Cranch, 32), it was held that "the legislative authority must first make an act a crime, affix a punishment to it, and declare the court that shall have jurisdiction of the offense," before the courts of the United States can exercise jurisdiction over it. This doctrine was affirmed by the case of the United States v. Coolidge *et al.* (1 Wheaton, 415), and Chief-Justice Marshall, in delivering the opinion of the court in *Ex parte* Bollman & Swartwout (4 Cranch,

In what three cases may a State be a party?

How and where must trials be had?

Define trial?

What means "crimes" here?

39.

95), said: "Courts which originate in the common law possess a jurisdiction which must be regulated by the common law, until some statute shall change their established principles; but courts which are created by written law, and whose jurisdiction is defined by written law, can not transcend that jurisdiction." And it was in following these cases that Justice McLean held, in *United States v. Lancaster* (2 McLean's R. 433), that "the federal government has no jurisdiction of offenses at common law. Even in civil cases the federal government follows the rule of the common law as adopted by the States, respectively. It can exercise no criminal jurisdiction which is not given by statute, nor punish any act, criminally, except as the statute provides." The same doctrine is followed in *Kitchen v. Strawbridge*, 1 Wash. C. C. R., 84; *United States v. New Bedford Bridge*, 1 Wood & Minot 401; *Ex parte Sullivan*, 3 Howard, 103; 12 Peters, 654; 4 Dallas, 10, and note; 1 Kent's Com. 354; Sedgwick on Statutory and Constitutional Law, 17; and Wharton, in reviewing this question, says: "However this may be on the merits, the line of recent decisions puts it beyond doubt that the federal courts will not take jurisdiction over any crimes which have not been placed directly under their control by act of Congress." (Am. Criminal Law, 174.) Report on the Impeachment of the President, 75, 76.

Define jury? "BY A JURY" is generally understood to mean, *ex vi termini*, a trial by a jury of *twelve* men, impartially selected (in accordance with law), who must *unanimously* concur in the guilt of the accused before a conviction can be had. Any law, therefore, dispensing with any of these requisites, may be considered unconstitutional. (*Work v. The State*, 2 Ohio St. R. 296; *The State v. Cox*, 3 English, 436; *The State v. The People*, 2 Parker C. C. 322, 329, 402, 562; 2 Leading Criminal Cases, 327, and note.) Story's Const. 3d edition, § 1779.

Does it make the jury the judges of the law? This does not constitute them judges of the law in criminal cases. *United States v. Morris*, 1 Curt. C. C. 23, 49; *United States v. Shive*, Bald. 510; *United States v. Battiste*, 2 Sumn. 240. And see *Townsend v. The State*, 2 Blackf. (Ind.), 152; *Pierce v. The State*, 13 N. H. 536; *Commonwealth v. Porter*, 10 Met. 263; *Commonwealth v. Sherry*, Wharton on Homicides, 481. It only embraces those crimes which by former laws and customs had been tried by jury. *United States v. Duane*, Wall. 106. It did not secure to the conspirators who assassinated the President in Washington city during the war, and while martial law existed in Washington city, the right to trial by jury. The Trial of the Conspirators.

231-237. This section compared with the fourth, fifth, and sixth amendments. *Ex parte Milligan*, 4 Wallace, 119; Story's Const. § 1782. The first of these secures a presentment or indictment by a grand jury before there can be a trial by a jury. *Id.* And for the reason of these amendments in the shape of a Bill of Rights, see 2 Elliot's Debates, 331, 380-427; 1 *Id.* 119-122; 3 *Id.* 139-153, 300.

Why in the States where committed?

213. IN STATES WHERE COMMITTED.—This was to prevent the defendant from being dragged into a distant State. (2 Elliot's

Debates, 399, 400, 407, 420; 2 Hale's P. C. ch. 24, pp. 260, 264; Hawk P. C. ch. 25, § 34; 3 Bl. Com. 383.)

Many of the States are divided into two or more districts (circuits) defined by law; and the rule of trying the accused in such district is believed to be now strictly adhered to.

214. "BUT WHEN NOT COMMITTED WITHIN ANY STATE, THE TRIAL SHALL BE AT SUCH PLACE OR PLACES AS CONGRESS MAY BY LAW HAVE DIRECTED."—The offenses committed in the District of Columbia have always been tried in the District, under the "exclusive legislation;" those in the organized territories have been tried there by the local courts of the territories; those committed by whites, or by Indians against whites (to a limited extent), have been tried in the States to whose federal courts jurisdiction had been committed by the laws to regulate trade and intercourse with the Indian tribes; those committed in forts and arsenals, over which jurisdiction had been ceded by the States, have been tried in the United States District or Circuit Courts in that State; those upon the high seas in the State where the vessel first arrives. Where are offenders tried?

So that "NOT COMMITTED IN ANY STATE," may be defined to be offenses committed in the District of Columbia, in forts or arsenals to which jurisdiction has been ceded by the States; in the territories of the United States; in the Indian country; upon the high seas, and everywhere, when against the law of nations.

SEC. III.—[1.] Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason, unless on the testimony of two witnesses to the same overt act, or on confession in open court. Define treason? 192. By how many witnesses?

215. "TREASON."—[Law Lat. *Proditio*. L. Fr. *Treson*, from *treer*, *trehir*, *trahir*, to betray.] Burrill's Law Dic., TREASON. Define treason at common law?

The word "ONLY" was used to exclude from the criminal jurisprudence of the new republic the odious doctrines of constructive treason. Its use, however, while limiting the definition to plain overt acts, brings these acts into conspicuous relief, as being always, and in essence, treasonable. Define "only"?

War, therefore, levied against the United States by citizens of the republic, under the pretended authority of the new State government of North Carolina, or the new central government which assumed the title of the "Confederate States," was treason against the United States. Chief-Justice Chase in *Shortridge v. Macon* (North Carolina), 16th June, 1867. 461.

In the prize cases the Supreme Court simply asserted the right of the United States to treat the insurgents as belligerents, and to claim from foreign nations the performance of neutral duties under the penalties known to international law. The decision recognized, also, the fact of the exercise and concession of belligerent rights, and affirmed, as a necessary consequence, the proposition that 117.

What were the relations of the inhabitants of the rebel States to those loyal to the Union? during the war all the inhabitants of the country controlled by the rebellion and all the inhabitants of the country loyal to the Union were enemies reciprocally each of the other. But there is nothing in that opinion which gives countenance to the doctrine which counsel endeavor to deduce from it: that the insurgent States, by the act of rebellion, and by levying war against the nation, became foreign States, and their inhabitants alien enemies. *United States v. Shortridge. Id.*

What is the effect of sequestration? Held, that the enforced payment of a debt under the confederate sequestration laws, was no protection. It was denied that the "Confederate States" was a *de facto* government.

For the enumeration of the acts of treason in England, see 4 Steph. Com. 185-193; 4 Bl. Com. 76-84; Wharton's American Crim. Law, B. 7, ch. 1, § 2715-2777. Burrill's Law Dic., TREASON.

What war is necessary? There must be an actual levying of war; a conspiracy to subvert the government by force is not treason; nor is the mere enlistment of men, who are not assembled, a levying of war. *Ex parte Bollman*, 4 Cr. 75; *United States v. Hanway*, 2 Wall. Jr. 140; *Id.* 136; 4 Am. L. J. 83. And no man can be convicted of treason, who was not present when the war was levied. 2 Burr's Trial, 401, 439; and see the same case, Appendix to 4 Cranch, 469-508. See *United States v. Willberger*, 5 Wheat. 97.

From whence copied? The whole definition is copied from the statute of 25 Ed. III., ch. 2; 1 Hale's Pleas of the Crown, 259; Judge Marshall's charge in Burr's Trial; Story's Const. § 1799. See 3 Wilson's Law Lect., ch. 5, pp. 95, 96; Montesquieu Spirit of Laws, B. 12, ch. 7; 4 Bl. Com. 75-84. The definition admits of no *constructive* treasons. Federalist, No. 43; Story's Const. § 1798; Jefferson's Correspondence, 72-103.

What is a levying of war? If war be actually levied, that is, if a body of men be actually assembled for the purpose of effecting by force a treasonable purpose, all who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors. But there must be an actual assemblage of men for the treasonable purpose, to constitute a levy of war. (*Ex parte Bollman*, 4 Cr. 126; *United States v. Burr*, 4 Cr. 469-508; *Sergts. Const.* ch. 30 [32]; *People v. Lynch*, 1 John. 553.)

And further, for the definition of treason, see *United States v. Hoxie*, 1 Paine, 265; *United States v. Hanway*, 2 Wallace, Jr. 139; *Regina v. Frost*, 9 C. & P. 129; 2 Bishop on Cr. Law, § 1032.

Treason is a breach of allegiance, and can be committed by him only, who owes allegiance either perpetual or temporary. *United States v. Willberger*, 5 Wheat. 97.

To what trial does it refer? **216. TWO WITNESSES.**—The evidence, it seems, refers to the proofs on trial, and not to the preliminary hearing before the committing magistrate, or the proceeding before the grand inquest. *United States v. Hanway*, 2 Wall. Jr. 138; 1 Burr's Trial, 196. But see Fries's Trial, 14 Whart. St. Tr. 480, and the same in 2 pamphlet, 171.

There must be, as there should be, the concurrence of two witnesses to the same overt act, that is, open act of treason, who are

above all reasonable exception. (*United States v. Burr*, 4 Cr. 469, 496, 503, 505, 506, 607; *Greenleaf's Ev.* § 237.)

[2.] The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted. What is the limitation on the punishment?

217. PUNISHMENT OF TREASON.—Punishment is the penalty of the law, inflicted after judgment or sentence. For the English punishment of treason, see *Story's Const.* § 1298, and notes. Define punishment?

The punishment was first declared by Congress to be death by hanging. Act of 30th April, 1790, ch. 36, 1 St. 112, § 1, note (a). It is now death or imprisonment. Act of 17th January, 1862, 12 St. 589, 590. See 1 *Brightly's Digest*, 201, § 1, notes a to h; *Wharton's Criminal Laws*, § 1117–1120; *Id.* 2719–2736; 2 *Brightly*, 100, 101.

ATTAINDER OF TREASON.—See Bill of Attainder, note 142.

“CORRUPTION OF BLOOD.”—By corruption of blood all inheritable qualities are destroyed; so that an attainted person can neither inherit lands nor other hereditaments from his ancestors, nor retain those he is already in possession of, nor transmit them to any heir. *Story's Const.* § 1299, 1300; 4 *Bl. Com.* 381–388. 142. Define corruption of blood?

The power of punishing treason against the United States is exclusively in Congress. (*The People v. Lynch*, 11 Johns. 553; *Rawle's Const.* ch. 11, pp. 140–143; *Id.* ch. 21, p. 207; *Sergeant's Const.* ch. 30 [ch. 32.]; *Story's Const.* § 1301.

ARTICLE IV.

SEC. I.—Full faith and credit shall be given in each State to the public acts, records; and judicial proceedings of every other State. And the Congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof. What credit shall be given to what acts, &c.? 462–467. Who may prescribe the proofs?

218. “FULL FAITH AND CREDIT,” as the cases cited will show, means that credit, which the State itself gives, not to the mode of proof, but to the acts when proven. Define full faith?

“PUBLIC ACTS.”—This has reference to the legislative acts and resolves; that is, to the laws of the State. Public acts?

“RECORDS” are the registration of deeds or the civil law records of titles, as in Louisiana, the registration of wills, public documents, archives, legislative journals; and, in fact, all acts, legislative, executive, judicial, and ministerial, which constitute the public records of a State. *McGrew v. Watrous*, 16 Tex. 509, 512; *White v. Burnley*, 20 How. 250; *Paschal's Annotated Digest*, Art. 3710, note 835. Records?

JUDICIAL PROCEEDINGS are the proceedings and judgments which appertain to courts of record. Define judicial proceedings?

What is the rule where jurisdiction has attached?

Where the jurisdiction has attached, the judgment is conclusive for all purposes, and is not open to any inquiry upon the merits. (*Bissell v. Briggs*, 9 Massachusetts, 462; *United States Bank v. Merchants' Bank*, 7 Gill, 430.) *Christmas v. Russel*, 5 Wall. 302. "If a judgment is conclusive in the State where it was pronounced, it is equally conclusive everywhere" in the courts of the United States. (*Story's Const.* § 1313, 3d ed.) *Id.* 302. By that statute (of Mississippi) it was enacted that "no action shall be maintained on any judgment or decree rendered by any court without this State, against any person who, at the time of the commencement of the action in which such judgment or decree was or shall be rendered, was or shall be a resident of this State, in any case where the cause of action would have been barred by any act of limitation of this State, if such suit had been brought therein." (*Mississippi Code*, 400.) This act was unconstitutional. *Christmas v. Russel*, 5 Wall. 299, 302. Had it been an act merely limiting the time within which the suit should be brought, it would have been constitutional. (*McElmoyle v. Cohen*, 13 Pet. 312.) *Id.* 300.

What is the effect of a judgment?

A judgment of a State court has the same credit, validity, and effect in every other court within the United States, which it had in the State where it was rendered. *Hampton v. McConnell*, 3 Wh. 234; *Sarchet v. The Davis, Crabbe*, 185. And it matters not that it was commenced by an attachment of property, if the defendant afterward appeared and took defense. *Mayhew v. Thatcher*, 6 Wh. 129. Nor that the service was illegal. *Houston v. Dunn*, 13 Tex. 480. Such judgments, as far as the court rendering them had jurisdiction, are to have, in all courts, full faith and credit; and the merits of the judgment are never put in issue, with the qualification, that it must appear by the record that the party had notice. *Benton v. Bergot*, 10 S. & R. 242. They have not, however, by the act of Congress, full power and conclusive effect, but only *such* effect as they possessed in the State where the judgment was rendered. *Green v. Sarmiento*, 3 Wash. C. C. 17; *Bank of the State of Alabama v. Dalton*, 9 How. 528. And therefore, whatever pleas would be good therein, in such State, and none others, can be pleaded in any other court within the United States. *Hampton v. McConnell*, 3 Wh. 234; *Mills v. Duryee*, 7 Cr. 484. Thus, it would be competent to show that the judgment was obtained by fraud, or that the court rendering it had no jurisdiction. *Warren Manufacturing Co. v. Etna Insurance Co.* 2 Paine, 502; *Steele v. Smith*, 7 W. & S. 447; *Drinkard v. Ingram*, 21 Tex. 653. This has been denied as to fraud between parties and privies. *Christmas v. Russel*, 5 Wall. 505-508. But not to litigate the merits of the judgment. *Ingram v. Drinkard*, 14 Tex. 352. When the judgment of a sister State is produced, which was rendered by a court of general jurisdiction, the presumption is in favor of the power and jurisdiction until the contrary appears. (*Scott v. Coleman*, 5 Littel, 350; *Mills v. Martin*, 19 Johns. 33; 3 Wend. 267; 4 Cow. 282; 6 Wend. 447; 8 Cow. 311; *Phillips's Evid.*, Cow. & Hill's Notes, vol. 5, p. 896, note 639.) And the plaintiff need not aver and prove the jurisdiction. *Reid v. Boyd*, 13 Tex. 242. Where the writ was a

capias ad respondendum, and the return was, "executed personally," 462-467. it was *prima facie* evidence of service. *Reid v. Boyd*, 13 Tex. 242, 243. If there has been no personal service, and if the defendant has not appeared and taken defense, the judgment of a sister State will not support an action. Notice or appearance is essential to the jurisdiction. *Webster v. Reid*, 11 How. 460; *Nations v. Johnson*, 24 How. 208. Notice by publication is not sufficient. *Boswell's Lessee v. Otis*, 9 How. 350; *Oakley v. Aspinwall*, 4 Comst. 135; *Mills v. Duryee*, 7 Cr. 481; *McElmoyle v. Cohen*, 13 Pet. 330. And see the notes in *American Leading Cases*, vol. 2, p. 551; 3 *Phillips's Ev.*, *Cow. & Hill's Notes*, p. 353, note 636.

If a court of any State should render judgment against a man not within the State, nor bound by its laws, nor amenable to the jurisdiction of the court, if that judgment should be produced in another State, against the defendant, the jurisdiction of the court might be inquired into; and if a want of jurisdiction appeared, no credit would be given to the judgment. *Bissell v. Briggs*, 9 Mass. 462; *Green v. Sarmiento*, 1 Pet. C. C. 20; *Hall v. Williams*, 6 Pick. 232; *Woodward v. Tremere*, 9 Pick. 355; *Schaffer v. Yates*, 2 Mon. 253; *Batwick v. Hopkins*, 4 Ga. 48; *Towns (Gov.) v. Springer*, 9 Ga. 132; *The Central Bank of Georgia v. Gibson*, 11 Ga. 455; *Darcy v. Ketchum*, 11 How. 165. And the judgment may be shown to be void, collaterally, for want of personal service. *Webster v. Reid*, 11 How. 460; *Gleason v. Dodd*, 4 Met. 333; *Lincoln v. Trevor*, 2 McLean, 473. Where the original process was attachment and publication, and no personal service, and judgment was rendered in California, and suit brought upon this judgment in Texas the California judgment was rightly held to be void. *Green v. Custard*, 23 How. 486. But where a suit was brought in chancery, in Mississippi, and the defendants were served with process, and appeared and answered, and the chancellor rendered a decree dismissing the bill; and two years afterward, a writ of error was prosecuted to the Supreme Court, and an affidavit filed that the defendants were not within the jurisdiction, and had no counsel within the jurisdiction, and citation to appear and defend the writ of error was published in a newspaper; after which the Supreme Court reversed the judgment, and rendered a decree against the defendants, which judgment was perfected by the chancellor; and upon this judgment suit was brought in the United States District Court of Texas: Held, that the judgment or decree was not a nullity, as it would have been had there been no original service. *Nations v. Johnson*, 24 How. 203. Some of the courts have strongly intimated that a law which should make a judgment, obtained without personal service, the foundation of an action, would be unconstitutional and void. And some of them go much further, and lay down the rule as applicable to the inception of the suit, that notice by publication is insufficient to support the judgment in any jurisdiction, except in the courts of the State where it was rendered. (*Boswell's Lessee v. Otis*, 9 How. 350; *Oakley v. Aspinwall*, 4 Comst. 513.) *Nations v. Johnson*, 24 How. 203. The publication in the Supreme Court will be held to be constructive service, provided the defendant was served with original process in the lower court, and appeared and

What is the
effect of
want of
jurisdiction?

467.

466, 467. took defense. *Nations v. Johnson*, 24 How. 203. A decree of a court of chancery is within this article and the act of Congress for authentication. *Patrick v. Gibbs*, 17 Tex. 277. And this court will not look to the formula of the decree, if the parties, and the final result be certain, so that it is a final judgment which could be enforced in the sister State from which it came. (*Whiting v. The Bank*, 13 Pet. 6; *Ordinary v. McClure*, 1 Bailey, 7.) *Patrick v. Owens*, 17 Tex. 278. Judgments of foreign countries may be proved:—1. By an exemplification under the great seal; 2. By a copy proved to be correct; 3. By the certificate of an officer authorized by law, which certificate must, of itself, be properly authenticated. (*Church v. Hubert*, 2 Cr. 187.) *Phillips v. Lyons*, 1 Tex. 394.

How may judgments of a foreign country be proved?

Define the great seal?

The "Great Seal" means the seal of the nation, whether the country be a monarchy or a republic. *Phillips v. Lyons*, 1 Tex. 394. The seal of one of the States of the American Union, is not the "Great Seal." *Id.*; *Wellborn v. Carr*, *Id.* 469.

What is the limitation upon judgments?

In a suit upon a judgment obtained in courts other than the courts of the State, the limitation prescribed by the law of the forum will bar the action, although the period be shorter than that prescribed for judgments of the State where the suit was brought. *McElmoyle v. Cohen*, 13 Pet. 312; *Story's Conflict of Laws*, § 582; *Robinson v. Peyton*, 4 Tex. 278; *Pryor v. Moore*, 8 Tex. 252; *Bacon v. Howard*, 20 How. 23. First, that the statute of limitations of Georgia can be pleaded to an action in that State, founded upon a judgment rendered in the State of South Carolina; and, secondly, that in the administration of assets in Georgia, a judgment rendered in South Carolina, upon a promissory note against the intestate when in life, should not be paid in preference to simple contract debts. *Mills v. Duryee*; *McElmoyle v. Cohen*, 13 Pet. 330. Affirmed in a Texas case. *Bacon v. Howard*, 20 How. 25. There is no clause in the Constitution which restrains this right in each State to legislate upon the remedy in suits on judgment of other States, exclusive of all interference with their merits. *Id.* The act of the congress of Texas, of 25th June, 1845, which prescribed the time within which suits on judgments rendered in foreign States should be brought, having been passed before annexation, was not subject to this provision of the Constitution of the United States; but if it had been, the law would not have been unconstitutional. *Robinson v. Peyton*, 4 Tex. 278; *Pryor v. Moore*, 8 Tex. 250; *Bacon v. Howard*, 20 How. 22. It has been held, under the Texas statute of limitations, that the same rule applies to a judgment of a sister State as to a judgment of this State. (*Clay v. Clay*, 13 Tex. 195; *Allison v. Nash*, 16 Id. 560.) *Spann v. Crummerford*, 20 Tex. 220.

Are the judgments *prima facie* or conclusive?

Judgments of another State are not *prima facie*, but conclusive evidence of debt. They can be impeached on such grounds only as would be good against a judgment of a sister State. *Clay v. Clay*, 13 Tex. 204. The judgments rendered before a justice of the peace of a sister State, are not judgments of courts of record within this article, unless it be averred and proved that the State law had made them so. *Beal v. Smith*, 14 Tex. 309. The opinion reviews the authorities in *Cowen & Hill's Notes to Phillips's Evidence*, Part 2,

note 58. And see *Grant v. Bledsoe*, 20 Tex. 458; *Thomas v. Robinson*, 3 Wend. 267. 467.

The legislation of Congress amounts to this: that the judgment of another State shall be record evidence of the demand; and that the defendant, when sued on the judgment, cannot go behind it and controvert the contract or other cause of action on which the judgment is founded; that it is evidence of an established demand, which, standing alone, is conclusive between the parties to it. (Bank of the State of Alabama v. Dalton, 9 How. 528.) *Norwood v. Cobb*, 20 Tex. 594. What does the legislation amount to?

They certainly are not foreign judgments; nor are they domestic judgments in every sense, because they are not the proper foundation of final process, except in the State where they were rendered. Besides, they are open to inquiry as to the jurisdiction of the court and notice to the defendant; but in all other respects they have the same faith and credit as domestic judgments. Are the judgments foreign or domestic?

Subject to those qualifications, the judgment of a State court is conclusive in the courts of all the other States wherever the same matter is brought in controversy. The established rule is, that so long as the judgment remains in force it is of itself conclusive of the right of the plaintiff to the thing adjudged in his favor, and gives him a right to process, mesne or final, as the case may be, to execute the judgment. *D'Arcy v. Ketchum et al.* 11 Howard, 165; *Webster v. Reid*, Id. 437; *Voorhees v. United States Bank*, 10 Peters, 449; *Huff v. Hutchinson*, 14 Howard, 558; *Christmas v. Russel*, 5 Wall. 305; *Benton v. Barget*, 10 Sergt. & Rawle, 240.

To render a defense, or plea to the judgment of another State good, it must go sufficiently far to negative the reasonable intentment which exists, *prima facie*, in favor of the jurisdiction, and of the regularity of the proceedings. (*Shumway v. Stillman*, 4 Cow. 296; 6 Wend. 447; *Holt v. Alloway*, 2 Blackford, 108; *Welch v. Sykes*, 3 Gil. 197; *Moreland v. Trenton Ins. Co.* 4 Zabriskie, 222; *Latterett v. Cooke*, 1 Clarke, 1; *Black v. Black*, 4 Brad. 174; *Bissell v. Wheelock*, 11 Cush. 277; *Buchanan v. Post*, 5 Ind. 264.) 1 Smith's Leading Cases, Part 2, pp. 1026, 1027.

It is now well settled that judgments of one State of the Union may be controverted in another, on the ground that the court which pronounced them did not obtain jurisdiction over the parties by due service of process or notice. (*Reed v. Wright*, 2 Iowa, 15; 2 Am. Leading Cases, 798, 4th ed.; *Price v. Ward*, 1 Dutcher, 225; *Smith v. Smith*, 17 Ill. 482; *Rape v. Heaton*, 9 Wis. 328; *Black v. Black*, 4 Brad. 174; *Wright v. Boynton*, 37 N. H. 9; *Judkins v. Union Life Ins. Co.* Id. 470; *McLaurine v. Monroe*, 30 Mo. 462.) 1 Smith's Leading Cases, Part 2, p. 1025. This may be not only proven in opposition to the record, but also against its averments. *Id.* *Baltzell v. Nosler*, 1 Clarke, 588; *Gleason v. Dodd*, 4 Met. 335; *Carleton v. Bickford*, 13 Gray, 591; *Norwood v. Cobb*, 15 Tex. 500; *S. C.* 24 Tex. 551; *Brinder v. Dawson*, 1 Scammon, 541. But, *contra*, see *Pritchett v. Clark*, 5 Harrington, 63; *Westcott v. Brown*, 15 Ind. 83; *Rowe v. Hackett*, 2 Bosworth, On what ground may judgments be controlled?

467. 579; Lapham v. Briggs, 1 Williams, 29; Bank of North America v. Wheeler, 24 Conn. 433.

How are
acts of the
legislature
authenti-
cated?
Act of
May 26,
1790, 1 St.
122.

219. CONGRESS MAY PRESCRIBE THE MANNER OF PROVING.—
The mode of proof prescribed under this clause has been as follows:—

Judicial
proceed-
ings?

“The acts of the legislatures of the several States shall be authenticated by having the seal of their respective States affixed thereto: That the records and judicial proceedings of the courts of any State shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief-justice, or presiding magistrate, as the case may be, that the said attestation is in due form. And the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them, in every court within the United States, as they have, by law or usage, in the courts of the State from whence the said records are or shall be taken.” Paschal's Annotated Dig., Art. 3709.

What does
the seal of
State
import?

The seal of the State imports absolute verity. The United States v. Amedy, 11 Wheat. 407; The United States v. Johns, 4 Dall. 416. And is *prima facie* evidence that the officer who used it had competent authority to act. No other authentication is necessary than the seal of the State. Id. The usual attestation of the enactment and signature is not necessary. United States v. Amedy, 11 Wheat. 408. It is sufficient that their existence and time of enactment is shown. Id. It must be certified under the seal of the State. Craig v. Brown, Pet. C. C. 354. The laws of a State may be thus certified and proved. But private laws, and special proceedings of a judicial character, are matters of fact, and must be proven in the ordinary manner. Leland v. Wilkinson, 6 Pet. 317, 322. A statute book of a State, in the State Department at Washington, may be read as evidence of the law. The Commercial & Farmers' Bank of Baltimore v. Patterson, 2 Cr. C. C. 347.

How are
judgments
proved?

Under the Constitution and this section, a judgment recovered in any State of the Union, before a court of competent jurisdiction, upon due notice to the defendant, is not to be regarded in any other State as a *foreign*, but as a *domestic* judgment, throughout the United States, so far as to give it the same effect in every other State. Baxley v. Dinah, 27 Penn. State R. (4 Harris), 242, 247. And the State court will take notice of the local laws, upon which the judgment was rendered, in the same manner as the Supreme Court of the United States does. (7 Cr. 408; 3 Wheat. 234; Baxley v. Dinah, 27 Penn. State R. (4 Harris), 243.) State of Ohio v. Hinchman, 27 Penn. State R. (4 Harris), 483; Rogers v. Burns, Id. 526. And if the certificate state that it is in “due form,” it matters not that the judge and the clerk of the probate court were the same person. Id. But as a surrogate acts as a clerk, in certifying his proceedings, and as he also acts in the capacity of judge, he must certify as to the authentication. (Catlin v. Underhill, 4 McLean, 190.) Ohio v. Hinchman, 27 Penn. State R. 484. So that it results that when the judgment of a court of record is *proved* under

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Who must
certify the
clerk's sig-
nature?

the act of Congress, the court where it is produced will take the same notice of the laws of the State from which it comes, that the court which rendered the judgment, or the Supreme Court of the United States would take. *Id.* This rule seems only to apply to courts of general jurisdiction. 1 Greenl. Ev. § 506. It does not apply to judgments rendered before a justice of the peace, when not courts of record. (Cow. & Hill's Notes to Phillips's Ev. Part 2, note 58.) *Beal v. Smith*, 14 Tex. 309; *Grant v. Bledsoe*, 20 Tex; 458; *Snyder v. Wyse*, 10 Barr, 157; *Warren v. Flagg*, 2 Pick. 448; *Robinson v. Prescott*, 4 N. H. 450; *Mahuren v. Blackford*, 6 N. H. 567; *Silver Lake Bank v. Harding*, 5 Ohio, 545; *Thomas v. Robinson*, 3 Wend. 267. Unless they be courts of record. *Bissell v. Edwards*, 5 Day, 363; *Blodget v. Jordan*, 6 Verm. 580; *Starkweather v. Loomis*, 2 Verm. 573; *Scott v. Cleveland*, 3 Monr. 62. But the proceedings of courts of chancery and probate, as well as of common law, may be thus proved. *State of Ohio v. Hinchman*, 27 Penn. State R. (4 Harris), 243; *Scott v. Blanchard*, 8 Mart. (N. S.) 106; *Balfour v. Chew*, 5 Id. 517; *Johnson v. Runnells*, 6 Id. 621; *Ripple v. Ripple*, 1 Rawle, 381; *Craig v. Brown*, Pet. C. C. 352; *Hunt v. Lyle*, 8 Yerg. 142; *Barbour v. Watts*, 2 A. K. Marsh, 290, 293. Other judicial proceedings besides judgments are included. *Hopkins v. Ludlow*, Phila. R. 272.

466.

How may
chancery
proceedings
be proved?

"OF ANY STATE," does not apply to the records of the courts of the United States. *Mason v. Lawrence*, 1 Cr. C. C. 190. But the same rule of proof is applicable to these courts. *Tucker v. Thompson*, 3 McLean, 94. And may be proved by like certificates. *Bufford v. Hickman*, Hemp. 232. This method of proof is not exclusive of any other which the States may prescribe. *Ohio v. Hinchman*, 24 Penn. State R. 485; *Kean v. Rice*, 12 S. & R. 203, 208; *Raynham v. Canton*, 3 Pick. 293; *The State v. Stade*, 1 D. Chipm. 303; *Biddle v. James*, 6 Binn. 321; *Ex parte Poval*, 3 Leigh, 816; *Ellmore v. Mills*, 1 Hayw. 359; *Baker v. Jenkins*, 2 Johns. Cases, 119. The clerk who certifies the record, must be the clerk of the same court, or of its successor; the certificate of his under clerk, in his absence, or the clerk of any other court or tribunal, is insufficient. *Sampson v. Overton*, 4 Bibb, 409; *Lathorp v. Blake*, 3 Barr, 405; *Donahoo v. Brannon*, 1 Overton, 328; *Schnertzell v. Young*, 3 H. & McHen. 502. Where the clerk certified under the seal of the court, that he was clerk; and the judge certified that his attestation was in due form, no other evidence of the usual form of attestation can be received. *Harper v. Nichol*, 13 Tex. 161. When the court has no seal, the fact should be certified by the court or the judge. *Craig v. Brown*, Pet. C. C. 353. The seal must be annexed to the record itself; not to the judge's certificate. *Turner v. Waddington*, 3 W. C. C. 126. The certificate to the clerk's attestation must be given by the judge, if there be but one; or if there be more than one, then by the *chief-justice or presiding judge or magistrate* of the court from whence the record comes; and he must possess that character at the time he gives the certificate. A certificate that he is the judge who presided at the time of the trial, or that he is the senior judge of the courts of law in the State, is deemed insufficient. *Lathorp v. Blake*, 3 Barr, 496; *Stephenson v. Bannister*, 3 Bibb, 369; *Kirkland v. Smith*, 2 Mart.

What means
"of any
State?"

What judge
must
certify?

Certificate. (N. S.) 407. And so is the certificate of the judge, styling himself "one of the judges of the court." *Stewart v. Gray*, Hemp. 94; *Catlin v. Underhill*, 4 McLean, 199. The certificate of the judge must state that the attestation of the clerk is in due form. *Wigg v. Conway*, Hemp. 538. Which means, the form of attestation used in the State from whence the record comes. *Craig v. Brown*, Pet. C. C. 354. And such certificate of the judge is indispensable and conclusive. *Ferguson v. Harwood*, 7 C. R. 408; *Tooker v. Thompson*, 3 McLean, 33; *Taylor v. Carpenter*, 2 W. & M. 4. That the "signature is in the clerk's handwriting," is not sufficient. *Craig v. Brown*, Pet. C. C. 352. Where, however, the record of a judgment of a State court is offered in evidence in a circuit court sitting in the same State, the certificate of the clerk, and seal of the court, is a sufficient authentication. *Mewster v. Spaulding*, 6 McLean, 24.

What validity has the judgment? 218. A judgment of a State court has the same validity, credit, and effect, in every other court within the United States, that it had in the State wherein it was recovered; and whatever pleas would be good in a suit thereon, and none others, can be pleaded in any other court within the United States. *Hampton v. McConnell*, 3 Wheat. 234; *Mills v. Duryee*, 7 Cranch, 481; *Westerwelt v. Lewis*, 2 McLean, 511; *Warren Manuf. Co. v. Aetna Ins. Co.* 2 Paine, 502; 2 Am. Leading Cases, 774. But the State may enact statutes of limitation, barring such judgment in their courts. *McElmoyle v. Cohen*, 13 Pet. 312; *Bank State of Ala. v. Dalton*, 9 How. 522. There must have been personal appearance, or service of process. *D'Arcy v. Ketcham*, 11 How. 165; *Rogers v. Burns*, 24 Penn. State R. (3 Casey), 525. Where judgment was rendered in a sister State against an ancillary administrator, it is no foundation for an action, in Texas, against the administrator or heir of the same estate. (Story's Conflict of Laws, 3d ed. § 522; *Lightfoot v. Birkley*, 2 Rawle, 431, 436-7.) *Jones v. Jones*, 15 Tex. 464. The record, when duly authenticated, shall have in every other court of the United States the same faith and credit as it has in the State court from whence it was taken." (*Mills v. Duryee*, 7 Cr. 483) *Christmas v. Russell*, 5 Wall. 302.

Is *nil debet* a good plea? *Nil debet* is not a good plea to such a judgment. Id. 304. Nor is fraud as to the promise on which the judgment was obtained; nor the manner of obtaining it. (*Bank of Australasia v. Nias*, 4 Eng. Law and Eq. 252.) Id.; *Granger v. Clark*, 22 Maine, 130; *Anderson v. Anderson*, 8 Ohio, 108. They cannot be attacked collaterally by the parties and privies to the record. *B. & W. Railroad v. Sparhawk*, 1 Allen, 448; *Homer v. Fish*, 1 Pickering, 435; *McRae v. Mattoon*, 13 Pickering, 57; *Atkinsons v. Allen*, 12 Vermont, 624; *Christmas v. Russel*, 5 Wall. 306. That is where it appears that the court had jurisdiction of the cause, and that the defendant was duly served with process, or appeared and made defense. (*Hampton v. McConnel*, 3 Wheaton, 332; *Nations et al. v. Johnson et al.* 24 Howard, 203; *D'Arcy v. Ketchum*, 11 Id. 165; *Webster v. Reid*, Id. 460.) 5 Wall. 302. The rule is undeniable that the judgment or decree of a court possessing competent jurisdiction is final, not only as to the subject thereby de-

terminated, but as to every other matter which the parties might have litigated in the cause, and which they might have had decided. (*Dobson v. Pearce*, 2 Kernan, 165. *Hollister v. Abbott*, 11 Foster, 448; *Rathbone v. Terry*, 1 Rhode Island, 77; *Topp v. The Bank*, 2 Swan, 188; *Wall v. Wall*, 28 Mississippi, 413.) *Christmas v. Russell*, 5 Wall. 307. Conclusive.

"1. From and after the passage of this act, all records and exemplifications of office books, which are or may be kept in any public office of any State, not appertaining to a court, shall be proved or admitted in any other court or office in any other State, by the attestation of the keeper of the said records or books, and the seal of his office thereto annexed, if there be a seal, together with a certificate of the presiding justice of the court of the county or district, as the case may be, in which such office is or may be kept; or of the governor, the secretary of State, the chancellor, or the keeper of the great seal of the State, that the said attestation is in due form, and by the proper officer; and the said certificate, if given by the presiding justice of a court, shall be further authenticated by the clerk or prothonotary of the said court, who shall certify, under his hand and the seal of his office, that the said presiding justice is duly commissioned and qualified; or if the said certificate be given by the governor, the secretary of State, the chancellor or keeper of the great seal, it shall be under the great seal of the State in which the said certificate is made. And the said records and exemplifications, authenticated as aforesaid, shall have such faith and credit given to them in every court and office within the United States, as they have by law or usage, in the courts or offices of the State from whence the same are or shall be taken." *Paschal's Annotated Digest*, Art. 3710; 1 *Brightly's Dig.* p. 266. Act of March 27, 1804, 2 Stat. 208.
What is the mode of proving other than judicial records?

Where a conveyance to lands in Texas was dated on the 14th April, 1838, and executed and recorded before a notary public of the city of New Orleans, La., in accordance with the laws of Louisiana, a copy of which was certified by the notary's successor, on the 6th March, 1851; to which was appended the certificate of the judge of the district court of New Orleans, that the certificate was in due form, and by the proper officer; and the official certificate of the clerk of that court, that the judge was such, the authentication was in accordance with this act. *Watrous v. McGrew*, 16 Tex. 509, 512. See *Paschal's Annotated Digest*, note 508. By that article (Ord. of 22d January, 1836) and the act of the provisional government of Texas, we take judicial notice of the civil code and Code of Practice of Louisiana. *Watrous v. McGrew* (16 Tex. 512), reviewed and affirmed. *White v. Burnley*, 20 How. 250. It was a civil law conveyance, made in a notary's book, and a copy furnished to the grantee, as a second original. *Id.* Sworn copies of records in a foreign country can be given in evidence when better evidence cannot be procured. But that they are records, must be shown by other evidence. *Bryant v. Kelton*, 1 Tex. 435, 436. The laws authorizing the record of bills of sale in a foreign country (as Georgia was before annexation), and showing who was the keeper of the records, How are civil law records proved?

466. should also be proven. *Id.* So where the record of a marriage, solemnized by a justice of the peace in Missouri, was certified under this act, the statute which authorized the justice to solemnize the marriage, should also have been proven; as also the statute authorizing the registration. *Smith v. Smith*, 1 Tex. 625, 626. The records are among the public writings recognized by the common law invested with an official character, and therefore susceptible of proof by secondary means, but which are not of the nature of judicial records or judgments; such as acts and orders of the executive of a State; legislative acts and journals; registers kept in public offices; books which contain the official proceedings of corporations, if the public at large are concerned with them; parish registers, and the like. *Snyder v. Wise*, 10 Barr, 158. The certificate must state that the attestation is in due form, and by the proper officer. *Drummond v. McGruder*, 9 Cr. 122; 1 Burr's Trial, 98.

Can records be proved by secondary evidence?

Act of March 27, 1804, 2 S. C. 208.

"2. All the provisions of this act, and the act to which this is a supplement, shall apply, as well to the public acts, records, office books, judicial proceedings, courts, and officers of the respective territories of the United States, and countries subject to the jurisdiction of the United States, as to the public acts, records, office books, judicial proceedings, courts, and offices of the several States." *Paschal's Annotated Dig. Art. 3711.*

This extension is a constitutional exercise of the legislative powers of Congress. *Hughes v. Davis*, 8 Maryland, 271.

What are the privileges of citizens?

SEC. II.—[1.] The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.

Who are citizens?

274, 17, 18.

220. "THE CITIZENS OF EACH STATE."—See *Confederation, ante*, Art. IV. p. 10. "I find no definition, no authoritative establishment of the meaning of the phrase (citizen of the United States), neither by a course of judicial decisions in our courts, nor by the continued and consentaneous action of the different branches of our political government." *Bates on Citizenship*, 3. 10 Op. 383.

How many classes of citizens of the U. S.?

169.

What is the rule as to colonists of 1776?

274.

277.

It may be deduced from the previous definitions and all the authorities, that the following classification of "CITIZENS" may satisfy most students:

1. All *white* persons, or persons of European descent, who were born in any of the colonies, or resided and had been adopted there before 1776, and who adhered to the cause of independence up to the fourth of July, 1776. *Paschal's Annotated Digest*, notes 147, 148, 238, 240, 350; *United States v. Ritchie*, 17 How. 538; *Orson v. Hoag*, 3 Hill (N. Y.), 80-85; *Jackson v. White*, 20 John, 313; *Inglish v. The Trustees of the Sailors' Snug Harbor*, 3 Pet. 99; *Kelly v. Harrison*, 20 Johns. Cases, 29; *Dawson v. Godfrey*, 4 Cr. 321; *Fairfax v. Hunter*, 7 Cr. 603; *Orr v. Hodgson*, 4 Wheat. 453. The males of these are eligible to the Presidency.

Who of the native born?

2. All the descendants of such persons, who have since been born in any of those thirteen States, or in any new State or Territory of the United States, or in the District of Columbia, or abroad,

since the enabling acts of Congress (Indians not taxed or tribal Indians excepted). That is, all free white persons born within the jurisdiction of the United States, and all born abroad, whose parents are citizens absent on business. Paschal's Annotated Digest, Art. 5410, Act of 10th Feb. 1855; 10 St. 604. 468, 469. 503, 504.

3. All the free white or European inhabitants of Louisiana, and the Creoles of native birth, residing there at the time of the purchase from Napoleon the First, by the treaty of 30th April, 1803, and who remained in and adhered to the United States, and the descendants of all such. 6 St. Art. III. p. 202. Who of the Louisiana territory?

4. All the inhabitants of Florida, at the date of the treaty of cession of 24th October, 1819, who adhered to the United States, and remained in the country. Treaty with Spain, 8 St. p. 256, Art. VI. This included those who had left their native domiciles, and were on their way to Florida at the time of the exchange of flags. Levy's (Yulee's) Case. This treaty is the law of the land, and admits the inhabitants of Florida to the enjoyment of the privileges, rights, and immunities of citizens of the United States. (American Insurance Company v. Carter, 1 Pet. 542, 543; and see United States v. Gratiot [4 Pet. 526]; Cross v. Harrison, 16 How. 189); S. C., Whiting, 332. What of the inhabitants of Florida? 19. 220.

5. All the free inhabitants of Texas at the date of the annexation of that republic (29th December, 1845), descendants of Africans and Indian tribes excluded. 9 St. 108; Paschal's Annotated Digest, p. 46, note 159; Calkin v. Cocke, 14 How. 227. Who became citizens by the annexation of Texas? 19. 220.

When the Congress of the United States, under the authority to admit new States, receives a foreign nation into the confederacy, the laws of these respective nations, in relation to the naturalization of individual immigrants, have no application to the respective citizens of each. By the very act of union, the citizens of each become citizens of the government or governments formed by this union. Cryer v. Andrews, 11 Tex. 105. See Sabariego v. McKinney, 18 How. 240; Paschal's Annotated Digest, notes 148, 237-240. What was the effect of annexation of Texas upon citizenship? 229, 93.

6. All the inhabitants of California and other territory acquired by the treaty of Guadalupe Hidalgo, on the 2d February, 1848 (St. 929, Art. VIII.), who remained and adhered to the United States. Sabariego v. McKinney, 18 Howard, 289; Paschal's Annotated Digest, p. 39, note 147. Who of the inhabitants of California became citizens? 229, 93.

By the plan of Iguala, adopted by the revolutionary government of Mexico, 24th Feb., 1821, it is declared that "all inhabitants of New Spain, without distinction, whether Europeans, Africans, or Indians, are citizens of this monarchy, with a right to be employed in any post, according to their merit and virtues;" and that "the person and property of every citizen will be respected and protected by the government." We are also referred to the treaty of Cordova, of 24th August, 1821, and the declaration of independence of the 28th September, 1821, reaffirming the principles of the plan of Iguala. Also to the decree of the 24th February, 1822, by which "the sovereign Congress declares the equality of civil rights to all free inhabitants of the empire, whatever may be their origin in the four quarters of the earth." Also to the decree of the 9th Who were citizens of Mexico? 229, 93.

Mexicans. April, 1823, which reaffirms the three guaranties of the plan of Iguala, viz.:—1. Independence; 2. The Catholic religion; 3. Union of all Mexicans of whatever race. The United States v. Ritchie, 17 How. 538. The decree of the 17th September, 1822, with a view to give effect to the 12th article of the plan of Iguala, declared that classification of the inhabitants, with regard to their origin, shall be omitted. *Id.* The foregoing solemn declarations of the political power of the government, had the effect, necessarily, to invest the Indians with the privilege of citizenship, as effectually as had the declaration of independence of the United States of 1776, to invest all those persons with these privileges, residing in the country at the time, and who adhered to the interests of the colonies. (*Ingles v. Sailors' Snug Harbor*, 3 Pet. 99, 121.) *Id.* 540. Under the Constitution and laws of Mexico, as a race, no distinction was made between the Indians, as to rights of citizenship and the privileges belonging to it, and the European or Spanish blood. *Id.*; Paschal's Annotated Digest, note 350. Therefore, all these inhabitants, without distinction of race or color, seem to have been made citizens of the United States.

Who of Arizona? 7. All the inhabitants (Mexican citizens) of Arizona, at the date of the Gadsden treaty (1854), who adhered to and remained in the United States. 10th St. 1035, Art. V.

Are there any by special enactments? 8. A few who have been naturalized by special enactments, as *La Fayette*.

Who of the former slaves and free persons of color? 9. All the slaves, who, by the laws of war, the proclamations of the Presidents, the oaths of amnesty and allegiance required by President Johnson, the thirteenth amendment of the Constitution of the United States, and the various amendments of the Constitutions of the fifteen slave States, the treaties with the Indians, the Civil Rights Bill, and the fourteenth (?) constitutional amendment, have become citizens of the United States. 14 St. 358 (Treaties), pp. 72, 85, 102, 117; Paschal's Annotated Digest, Art. 5382; note 144, p. 37; note 120, p. 24; note 1062, p. 786; note 1174, p. 930.

Who by naturalization? 10. All persons naturalized according to "uniform rule." 2 St. 153, 292, 811; 3 St. 53, 259; 4 St. 69, 310; 9 St. 240; 10 St. 604; 13 St. 957; Paschal's Annotated Digest, Arts. 5392–5412, notes 1168–1172, pp. 919–925; Story's Const. § 1806.

What rule as to women? And "any woman who might be lawfully naturalized under the existing laws, married, or who shall be married, to a citizen of the United States, shall be deemed and taken to be a citizen." 10 St. 604, § 2; Paschal's Annotated Digest, Art. 5411.

Who of the Indian tribes? 11. All such Indians as have ceased their tribal relations, and been declared citizens of the United States by treaties or acts of Congress: as the Choctaws, who remained citizens of Mississippi and Alabama, under the treaty of 1833; *Wilson v. Waul*, U. S. C., December 7, 1867, 6 Wall. 000. The Ottawas, by treaty of June 24 and July 28, 1862, to take effect five years from the ratification thereof, 12 St. 315; and 24th June, 1862. 12 St. 1237, Art. 1; the Wyandottes, 31st Jan. 1855, 10 St. 1159, Art. 1; Ottawas and Chippewas, of Michigan, 11 St. 621, Art. 5; Chippewas, 2d Aug. 1855, 11 St. 633, Art. 6; Pottawatomies, 15th Nov. 1861, 12

St. 1191, Art. 3; Kickapoos, 28th June, 1862, 13 St. 623, Art. 3; Indians. Delawares, 4th July, 1866, 14 St. 109.

12. Whether a corporation is "a citizen," within the meaning of this clause does not seem to be clearly determined. Bank of United States v. Devaux, 5 Cr. 61; Bank of Augusta v. Earle, 13 Pet. 586; Slocomb v. Bank of Vicksburg, 14 Pet. 60; Louisville Railroad Co. v. Letson, 2 How. 556; People v. Islay, 20 Barb. 68; Warren Manufacturing Co. v. Ætna Ins. Co. 2 Paine, 502; Holmes v. Nelson, Phila. R. 218, 219.

Is a corpora-
tion a citi-
zen?
205a.

As they are citizens of a State who may sue citizens of another State; as they are artificial persons; and as the guaranty secures the rights, whether the citizen of a State ever goes into another State or not, it is difficult to see why the rule will not apply, that the private corporation shall have all the privileges and immunities which like corporations have in the State where the right is asserted, not where the artificial person is created. See Mills v. The State, 23 Tex. 295, 302, 306; Paschal's Annotated Digest, notes 202, 203, 639.

It will thus be seen that all citizens of the United States are either native born or naturalized. The native born, who owe allegiance to the United States from the moment of their birth, *ought* to be citizens; and about it there never would have been any dispute, but for color and the extreme doctrines of States Rights, which maintained that there was no national citizenship. The adopted or naturalized citizens have been made so by treaties, statutes, and uniform rule of naturalization.

221. "PRIVILEGES AND IMMUNITIES."—And the words *rights*, *privileges*, and *immunities*, are abusively used, as if they were synonymous. The word "rights" is generic, common, embracing whatever may be lawfully claimed. Bates on Citizenship, 22.

Define priv-
ileges and
immunities.
220, 224.

Privileges are special rights belonging to the individual or class, and not the mass. Properly an exemption from some duty, an immunity from some general burden or obligation; a right peculiar to some individual or body. *Ex parte* Coupland, 26 Tex. 420. *Immunities* are rights of exemption only—freedom from what otherwise would be a duty or burden. Bates on Citizenship, 22.

"In my opinion the meaning is, that in a given State, every citizen of every other State shall have the same privileges and immunities—that is, the same rights—which the citizens of that State possess. They are not subject to the disabilities of alienage; they can hold property by the same titles by which every other citizen may hold it, and no other; discriminating legislation against them would be unlawful." Lemmon v. The People (Denio, J.), 20 N. Y. R. 608.

But the clause has nothing to do with the distinctions founded on domicile. The citizen cannot carry the legal institutions of his native State with him. The privileges and immunities are not limited by time, but are permanent and absolute. Any law which should deny ingress or egress to citizens would be void. *Id.*

The States possess the power to forbid the introduction into their territory of paupers, criminals, or fugitive slaves. (Moore v. Illinois, 14 How. 13.) Lemmon v. The People, 20 N. Y. R. 610.

How far can the State determine the *status* of persons?

The State may determine the *status* of persons within its jurisdiction, except so far as it has been modified or restrained by the Constitution of the United States. (Groves v. Slaughter, 15 Pet. 419; Moore v. Illinois, 14 How. 13; City of New York v. Miln, 11 Pet. 131, 139.) Lemmon v. The People, 20 N. Y. R. 603. See Articles of Confederation, *ante*, p. 10, Art. IV., Federalist, Nos. 42, 80; Story's Const. § 1098, 1804-1809.

What are the privileges and immunities here guaranteed?

This is confined to those privileges and immunities which are, in their nature *fundamental*; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several States which compose this Union, from the time of their becoming free, independent, and sovereign. They may be all comprehended under the following general heads:—Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and to obtain happiness and safety,—subject, nevertheless, to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one State, to pass through or to reside in any other State, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of *habeas corpus*; to institute and maintain actions of any kind in the courts of the State; to take, hold, and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the State, may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental; to which may be added, the elective franchise, as regulated and established by the laws or Constitution of the State in which it is to be exercised. Corfield v. Coryell, 4 Wash. C. C. 380-1; Smith v. Moody, 26 Ind. 302. And to this clause of the Constitution, it seems, may be properly referred the right which, it has been asserted, is possessed by a citizen of one State to pass freely with his slaves through the territory of another State, in which the institution of slavery is not recognized. United States v. Williamson, 4 Am. L. R. 19; see The People v. Lemmon, 5 Law Rep. 486. It does not embrace privileges conferred by the local laws of a State. Conner v. Elliott, 18 How. 591. Such as the rights of representation or election. Murray v. McCarty, 2 Munf. 393. And see the questions fully discussed in Scott v. Sandford, 19 How. 399.

Can a State make a citizen of the United States?

Negroes?

National citizenship?

Since the adoption of the Constitution no State can, by any subsequent law, make a foreigner, or any description of persons, citizens of the United States, nor entitle them to the rights and privileges secured to citizens by that instrument. Scott v. Sandford, 19 How. 393. Negroes are not "citizens" intended to be included in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. *Id.* 404. We must not confound the rights of citizenship which a State may confer within its own limits, and the rights of citizenship as a member of the Union. *Id.* 405. He may have all the rights and privileges of the citizen of a State, and yet not be entitled to the rights and

privileges of a citizen in any other State. *Id.* Nor have the States surrendered the power and privilege of conferring the rights and privileges of citizens, by adopting the Constitution of the United States. Each State may still confer them upon an alien, or any one it thinks proper, or upon any class or description of persons; yet he would not be a citizen in the sense in which the word is used in the Constitution of the United States, nor entitled to sue as such in one of its courts, nor to the privileges and immunities of a citizen in the other States. *Id.* The State cannot make a man a member of the community of the United States by making him a member of its own. *Id.* 406.

6.

Can a State
make citi-
zens of the
United
States?

"I fully concur in the statement that the description, *citizen of the United States*, used in the Constitution, has the same meaning that it has in the several acts of Congress passed under the authority of the Constitution." (William Wirt, Attorney-General, 1 Op. 7th Nov. 1821, vol. 1, p. 506.) Bates on Citizenship, 10 Op. 383, 389.

19, 30, 35, 63
69, 170.

But it means in them all the simple expression of the political *status* of the person in connection with the nation—that he is a member of the body politic. *Id.* 18.

It is said in the opinion that "the allegiance which the free man of color owes to the State of Virginia, is no evidence of citizenship, for he owes it not in consequence of an oath of allegiance." (1 Op. 506, Wirt.) "This proposition surprises me; perhaps I do not understand it. The oath of allegiance is not the cause but the consequence of citizenship. Upon the whole I am of the opinion that free persons of color *in Virginia* are not citizens of the United States, within the intent and meaning of the acts regulating the coasting and foreign trade." (1 Op. 510, Wirt.) Bates on Citizenship, 19. As an authority this opinion is rebutted by the opinion of Attorney-General Legaré, of 15th March, 1843. (4 Op. 147.) Bates, *Id.* He held that a colored man was a citizen of the United States, entitled to a pre-emption. *Id.*

Was a free
negro a
citizen of
Virginia?
93.

"If this be so (that is, if they be negroes), they are not citizens of the United States," entitled to passports under the act of 18th August, 1856, which restricts the right to *citizens*. (William L. Marcy, Sec'y of State, 4th Nov. 1856.) Bates on Citizenship, 20. But see the certificate offered, which is equivalent to a passport. *Id.* The citizens here spoken of are those who are entitled to "all the privileges and immunities of citizens." But free negroes, by whatever appellation we call them, were never in *any of the States* entitled to all the privileges and immunities of citizens, and consequently were not intended to be included when this word was used in the Constitution. (The State of Tennessee v. Ambrose, 1 Meigs, 331.) Bates on Citizenship, 21.

Were free
negroes in
any State
entitled
to all the
privileges?

The meaning of the language is that no privilege by, or immunity allowed to the most favored class of citizens in said State shall be withheld from a citizen of any other State. (Tennessee v. Ambrose, 1 Meigs, 331.) Bates on Citizenship. Either a free negro is not a citizen in the sense of the Constitution, or, if a citizen, he is entitled to all the privileges and immunities of the most favored class of *citizens*. But this latter consequence will be contended for by no one. It must then follow that they are not

Construe the
language?

How does
the Consti-
tution speak
of citizens?
221.

citizens. (Tennessee v. Ambrose, 1 Meigs, 331.) Bates on Citizenship. But the Constitution speaks of *citizens* only, without any reference to their rank, grade, or class, or to the number or magnitude of their rights and immunities—*citizens* simply, without an adjective to qualify their rights. *Id.*

274.

Scott v. Sandford, 19 How. 393, reviewed. *Id.* 24. It is shown that it only determines that persons of African descent, whose ancestors were of pure African blood, who have been *brought* to this country and sold, are not citizens of Missouri *in* the sense in which that word is used in the Constitution. Bates on Citizenship.

Indeed the exclusive right of the State of Missouri to determine and regulate the *status* of persons within her territory was the only point in judgment in the Dred Scott case, and all beyond this was *obiter*. (*Ex parte* Simmons, 4 Wash. C. C. R. 396; Groves v. Slaughter, 15 Pet. 508; Strader v. Graham, 10 How. 92.) Lemmon v. The People, 20 N. Y. (6 Smith), 624.

What was
the intention
of the
guaranty?

The intention of this clause was to confer on the citizens of each State all the privileges and immunities which the citizens of the same would be entitled to under the like circumstances. (Story's Const. § 1806.) Smith v. Moody, 26 Ind. 301. Among which privileges and immunities is the right to become a citizen of any one of the several States, by becoming a resident thereof. *Id.*

A citizen of the United States residing in any State of the Union, is a citizen of that State. (Gassies v. Ballou, 6 Peters, 761.) Smith v. Moody, 26 Ind. 301.

The thirteenth article of the Constitution of Indiana denies these rights to all persons of African descent. *Id.*

The case of Scott v. Sandford, 19 How. 417, 422, 423, quoted. *Id.*

The opinions of Attorneys-General Bates and Legaré, *ante*, quoted. *Id.* 303.

Is Scott v.
Sandford
law?

The opinion in Scott v. Sandford, though never formally overruled, is now disregarded by every department of the government. *Id.* 304. Passports are granted to free men of color; Congress declares them to be citizens; the Supreme Court of the United States admits them to its bar. *Id.*

6.
274.

At the time of the adoption of the Constitution, all free native-born inhabitants of the States of New Hampshire, Massachusetts, New York, New Jersey, and North Carolina, though descended from *African* slaves, were not only citizens of those States, but such of them as had the other necessary qualifications possessed the franchise of electors on equal terms with other citizens. (The State v. Manuel, 4 Dev. Bat. 20.) Smith v. Moody, 26 Indiana, 304.

18.

Who were
meant by
citizens of
the several
States?

144, 221, 206.

222. "OF CITIZENS IN THE SEVERAL STATES."—This was intended to secure to the citizens of every State, within every other, the privileges and immunities (whatever they might be) accorded in each to its own citizens, and no others. Lemmon v. The People, 20 N. Y. (6 Smith), 627. See Confederation, Art. IV. *ante*, p. 10.

221.

It did not mean that the citizens of Virginia, who were entitled to hold slaves there, could bring those slaves into New York and hold them as such, in accordance with the laws of Virginia. Lem-

mon v. People, 20 N. Y. (6 Smith), 627. Jackson v. Bulloch, 12 Conn. 38.

As a general principle, the slaves who were carried from slave to free States, with the permission of their masters, and permitted to reside there, obtained their freedom; and the owners could not resume their control over them as slaves upon the return of such slaves to such slave States. *Harry v. Lyles*, 4 H. & McHen. 215; *Baptiste v. Volundrum*, 5 H. & Johns. 86; *Davis v. Jaquin*, Id. 100, 107; *Respublica v. Blackmore*, 2 Yates, 234; C. S., *Addis*. 284; *David v. Porter*, 4 H. & McHen. 418; *Gilmer v. Fanny Gilmer*, Id. 143; *Lewis v. Fullerton*, 1 Rand. 15; *Butler v. Hopper*, 1 Wash. C. C. 499; *Vincent v. Duncan*, 2 Missouri, 214; *Milly v. Smith*, Id. 36; *Winney v. Whitesides*, 1 Id. 472; *Julia v. McKinney*, 3 Id. 270; *Nat. v. Ruddle*, Id. 400; *Vincent v. Duncan*, 2 Id. 214; *Rankin v. Lydia*, 2 A. K. Marshall, 467. See the cases fully collected in *Wheeler's Law of Slavery*, 335-388; *Cobb on Slavery*.

The result of the cases seems to be that the citizen of one State does not carry the local laws of his State, which are repugnant to the laws of his new domicile into that State. But when he goes into a State, he is entitled to all the rights and privileges of the citizens of that State, no more, no less. He is not entitled to vote, as one of his privileges, until the Constitution or laws of that State give him the *power*. See *Story's Conf. Laws*, § 321-327.

It is fresh in the memory of all that the Southern school occupied the ground that this was not the law as to the Territories, but that the citizen might carry his slave there, and hold him as a slave, despite any law of Congress or the Territories, until a State Constitution was formed for admission into the Union.

The opposite extreme held, that neither Congress nor the Territorial legislature, nor both combined, could legalize slavery in the "common territory;" but that it could only be legalized by a State Constitution, when the people were about to apply for admission into the Union. A subject which led to such opposite absurdities, might well be called a very *obscuring* one. See *Cobb on Slavery*; *passim*, *Douglas's Speeches* for ten years; the *Debates in Congress* from 1848 to 1860; *Benton's Thirty Years*, and the political platforms everywhere. *Scott v. Sandford*, 19 How. 393.

This "GUARANTY" applies to the people of the United States, whether existing in States complete, or in inchoate States called Territories. 6 Op. 304.

The fourth article of the Confederation quoted (*ante*, p. 10). Congress refused to insert the word "*white*." Id. It is clear that under the Confederation, and at the time of the adoption of the Constitution, free colored persons of *African* descent might be, and by reason of their citizenship in certain States were, citizens of the United States. *Smith v. Moody*, 26 Ind. 305; *Bates on Citizenship*.

[2.] A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall, on demand of the executive authority of the State from which he fled,

What was the effect of carrying slaves from a slave to a free State?

221.

18, 226-228.

226-228.

226.

p. 9.

What are the obligations as to fugitives from justice?

Fugitives. be delivered up, to be removed to the State having jurisdiction of the crime.

What does "person" mean? 16, 20, 21, 22, 24, 35, 46, 144, 169, 220, 226, 228, 215, 192, 194, 110-116. **223.** "A PERSON," in practice, has been held to extend to free and slave; naturalized and not naturalized; white, Indian, and colored; male and female; in fact, not only to the "people," the "numbers," or "inhabitants;" the "citizens," "aliens," and "all others;" but to every manner of "PERSON," whether resident, or not, who is "CHARGED IN ANY STATE WITH TREASON, FELONY, OR OTHER CRIME."

For what crimes?

213, 193, 194.

It is not necessary that the crime charged should constitute an offense at the common law. In the matter of William Fetter, 3 Zab. 311. It is enough that it is a crime against the laws of the State from which he fled. *Johnson v. Riley*, 13 Ga. 97; In the matter of Clark, 9 Wend. 221; *Commonwealth v. Daniels*, 6 Penn. L. J. 428; *Hayward's Case*, 1 Am. L. J. 231. The words embrace every act made punishable by the laws of the State. *Kentucky v. Ohio*, 24 How. 99. Misdemeanors as well as treason. *Id.* 100, 102. By the act of 12th Feb. 1793, 1 St. 302, provision is made to carry into practical effect this provision of the Constitution. *Johnson v. Riley*, 13 Ga. 133. All that is required is to produce the copy of an indictment found, or an affidavit made, before a magistrate of such State, charging the person so demanded with having committed a crime against the governor. *Id.*

8. What is "to flee"?

224. "WHO SHALL FLEE FROM JUSTICE AND BE FOUND IN ANOTHER STATE."—To FLEE is to run away, as from danger or evil; as "the wicked flee when no man pursueth." Webster's Dic., FLEE. Here, to be "found in another State" is sufficient without any actual flight.

Upon what may the fugitive be arrested?

A fugitive from justice may be arrested and detained until a formal requisition can be made by the proper authority. *Commonwealth v. Deacon*, 10 S. & R. 135; *Dow's Case*, 6 Harr. 39; In the matter of William Fetter, 3 Zab. 311; *The State v. Buzine*, 4 Harring, 572; In the matter of Clark, 9 Wend. 221; *Goodhue's Case*, 1 City Hall Recorder, 153; *Gardner's Case*, 2 Johns. 477; *Commonwealth v. Wilson*, Phila. R. 80. The executive upon whom the demand is made, cannot go behind the demand and accompanying charge of the governor demanding, to determine whether, by the laws of his own State, the offense charged is a crime. Each State, as a sovereign, must determine for itself, what is a crime. *Johnson v. Riley*, 13 Ga. 133-4. And see the case of *McGoffin*, Governor of Kentucky v. *Dennison*, Governor of Ohio, 24 How. 99, 100, 106. The duty of the executive on whom the demand is made, is merely ministerial. *Id.* This article was substantially copied from an article of the Confederation which required the demand to be made upon the executive. The same rule was intended. *Id.* 102-3; *ante*, Art. III. p. 10. The right to demand is absolute; and the duty to deliver, correlative. *Id.* 103. The proceedings should correspond to the act of 12th February, 1793. *Id.* The governor on whom the demand is made, cannot look to the sufficiency of the indictment. *Id.* 106-7. While the act of Congress declares that it is the "duty" of the governor to comply with the

Is the indictment conclusive?

demand, there is no power in the Supreme Court of the United States to enforce the performance of this moral duty. *Kentucky v. Ohio*, 24 How. 107-8.

The relator insists on his discharge, on the ground of insufficiency and illegality of the warrant; in this, that it does not show by recital, that the representation and demand of the governor of the State of Arkansas, was accompanied with a copy of an indictment found, or an affidavit made, before some magistrate of the State of Arkansas, certified to by said executive as being duly authenticated, and charging the relator with having committed the crime of forgery within the said State; and we are of opinion, that, on the ground set forth, he is entitled to his discharge. *Ex parte Thornton*, 9 Tex. 644-5. The chief-justice quoted the foregoing clause of the Constitution and the act of 1793, and concluded the things necessary are:—1. A copy of the indictment found, or affidavit made, charging the alleged fugitive with having committed the crime. 2. The certificate of the executive of Arkansas, that such copy was authentic. (*Ex parte Clark*, 9 Wend. 222, cited.) The counsel for Thornton had relied upon this case, and *Buckner v. Finley*, 2 Pet. 586; *Ex parte Holmes*, 12 Vt. 631; *Case of Jose Ferriara de los Santos*, 2 Brock. 493; *The matter of Short*, 10 S. & R. 125; *Holmes v. Jennison*, 14 Pet. 540; *Warden v. Abell*, 2 Wash. Va. 359, 380. The alleged crime must have been committed in the State from which the party is claimed to be a fugitive; and he must be actually a fugitive from that State. *Ex parte Joseph Smith*, 3 McLean, 133; *Hayward's Case*, 1 Am. L. J. 231; *In the matter of William Fetter*, 3 Zab. 311. The affidavit, when that form of evidence is adopted, must be at least so explicit and certain that, if it were laid before a magistrate, it would justify him in committing the accused to answer the charge. 6 Penn. L. J. 414, 418. It must state positively that the alleged crime was committed in the State from which the party is alleged to be a fugitive, and that the party is actually a fugitive from the State. *Ex parte Smith*, 3 McLean, 121, 132; *Fetter's Case*, 3 Zab. 311; *In the matter of Hayward*, 1 Sandf. S. C. 701; *Degant v. Michael*, 3 Cart. 396.

What are the requisites of?

What must the affidavit contain?

For the general principles, as an international question, see 1 Kent's Com. Lect. 2, p. 36; *Matter of Washburn*, 4 John. Ch. R. 106; *Rex v. Bull*, 1 Am. Jurist, 297; *Vattel*, B. 2, § 76, 77; *Rutherford Inst.* B. 2, ch. 9, § 12; *Commonwealth v. Deacon*, 10 Serg. & R. 125; 1 Am. Jur. 297; *Commonwealth v. Green*, 17 Mass. 515, 546-548; *In re Fetter*, 3 Zab. 311; *Executive Document of 1840*, 1 Sess. 26 Cong. No. 99.

225. "SHALL ON DEMAND, ETC., BE DELIVERED UP."—A precept by the governor of a State, appointing an agent to receive a fugitive from justice, reciting that he had made a requisition, agreeably to the Constitution and laws of the United States, upon the governor of the State into which the fugitive was alleged to have escaped, is *prima facie* evidence, for the protection of the agent, of the truth of the recitals. *Commonwealth v. Hall*, 9 Gray (Mass.), 267. A *prima facie* case is all that is necessary. *Somerset's Case*, 20 State Trials 79. Story's Const. § 1812.

The warrant. And a warrant issued by the governor on whom the demand is made, to "take and receive into custody" a fugitive from justice, authorizes him to arrest such fugitive; and is not repugnant to the Constitution and laws of this State or of the United States. Commonwealth v. Hall, 9 Gray (Mass.), 267. The foreign extradition jurisdiction is purely political; and does not properly belong to the judiciary, but to the executive. (*In re Kaine*, 14 How. 103.) Curtis' Com. § 94, 95. And see *Holmes v. Jennison*, 14 Pet. 540; S. C., Curtis' Com. § 218, note 1. The governor may mean the "executive authority of a State," under the U. S. statute of Feb. 12, 1793. (1 St. 302; 1 Brightly's Dig. 293.) Commonwealth v. Hall, 9 Gray (Mass.), 262. Where the warrant is issued, the courts cannot go behind it; the only question they can entertain is as to the identity of the alleged fugitive. *Pennsylvania v. Daniels*, 6 Penn. L. J. 417, note; *The State v. Buzine*, 4 Harring. 572.

223. Suppose the fugitive has been convicted and pardoned? Where a defendant is brought into a State as a fugitive from justice, after acquittal, or conviction and pardon, he cannot be surrendered to the authorities of another State as a fugitive, but must be allowed an opportunity to return to the State in which he is domiciled. *Daniels' Case*, cited in *Binn's Justice*, 267. The agent appointed under the second section of the act of 12th Feb., 1793 (1 Stat. 302), is not liable to an action for false imprisonment by reason of any irregularity in the warrant of arrest. *Johnston v. Vanamringe*, 2 Blackwood, 311.

What are the obligations as to persons held to service?

[3.] No person held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.

What is a person?

227, 224. **226.** "A PERSON," here is limited, in practice, to apprentices and fugitive slaves; but there is no sound reason why it should not apply to all the domestic relations, where the party is "held to service or labor." See Act of 12th Feb., 1793, 1 Stat. 302; Act of 18th Sept., 1850, 9 Stat. 462; 1 Brightly's Dig. 294, 295; 6 Op. 309; 3 Black. Com. 4.

What means in a State?

225, 226, 2. "IN ONE STATE."—This extends to the Territories, District of Columbia, and the Indian Territory. See 6 Op. 302–306; 3 Op. 370. The word "State," in both clauses of this article is *pari materiam*, and it possesses, in some of its relations, a meaning broader than its apparent or usual signification. 6 Op. 304, which fully discusses the whole subject.

What means escaping?

222. **227.** "UNDER THE LAWS THEREOF ESCAPING INTO ANOTHER."—"Escaping," here is not so comprehensive as "fleeing," in the last clause, since if the slave be carried by his master into another State, and there left, he obtains his freedom. See note 222; Webster's Dictionary, ESCAPE.

226.

This includes apprentices. *Boaler v. Cummins*, 1 Am. L. R. 654. It does not extend to the case of a slave voluntarily carried

by his master into another State, and there leaving him, under the protection of some law declaring him free. *Butler v. Hopper*, 1 Wash. C. C. 499; *Vaughan v. Williams*, 3 McLean, 530; *Pierce's Case*, 1 Western Leg. Ob. 14; *Kauffman v. Oliver*, 10 Barr, 517; *Strader v. Graham*, 10 How. 82; *Miller v. McQuerry*, 5 McLean, 460; In the matter of *Perkins*, 2 Cal. 424; *Commonwealth v. Alberti*, 2 Par. 505. Slavery is a municipal regulation; is local; and cannot exist without authority of law. *Miller v. McQuerry*, 5 McLean, 469. But the question, whether slaves are made free by going into a State in which slavery is not tolerated, with the permission of their master, is purely one of local law, and to be determined by the courts of the State in which they may be found. *Strader v. Graham*, 10 How. 82; *Scott v. Sandford*, 19 How. 396. See In the matter of *Perkins*, 2 Cal. 424.

Did it apply to slaves who were allowed to go voluntarily into a free State?

It was formerly held that the President had no power to cause fugitive slaves, who had taken refuge among the Indian tribes, to be apprehended and delivered up to their owners. 3 Opin. 370. But this has been since overruled, and it is now held that such fugitive in the Indian territory, being there unlawfully, and as an intruder, is subject to arrest by the executive authority of the United States; and if in such territory there be no commissioner of the United States to act, the claimant may proceed by recapture without judicial process. 6 Opin. 302.

As to slaves in Indian country?

The owner of a slave is clothed with full authority, in every State of the Union, to seize and recapture his slave, whenever he can do it without a breach of the peace, or any illegal violence. *Prigg v. Pennsylvania*, 16 Pet. 539; *Norris v. Newton*, 5 McLean, 92; *Johnson v. Tompkins*, Bald. 571; *Commonwealth v. Taylor*, 2 Am. L. J. 258; *Van Metre v. Mitchell*, 7 Penn. L. J. 115. But it is under the Constitution and acts of Congress only, that the owner of a slave has the right to claim him in a State where slavery does not exist. There is no principle in the common law, in the law of nations, or of nature, which authorizes such a recapture. *Giltner v. Gorham*, 4 McLean, 402. The Constitution, however, recognizes slaves as property, and pledges the federal government to protect it. *Scott v. Sandford*, 19 How. 395. A statute which punishes the harboring or secreting a fugitive slave, is not in conflict with the Constitution or laws of the United States. *Moore v. Illinois*, 14 How. 13. Nor does the Constitution exempt fugitive slaves from the penal laws of any State in which they may happen to be. *Commonwealth v. Holloway*, 3 S. & R. 4.

What were the owner's power over his slaves?

The Constitution confers on Congress an exclusive power to legislate concerning fugitive slaves; and the act of 1793 was constitutional and valid. *Prigg v. Pennsylvania*, 16 Pet. 539; In the matter of *Martin*, 2 Paine, 348; *Jones v. Vanzandt*, 2 McLean, 612; In the matter of *Susan*, 2 Wheat. Cr. Cases, 594.

Is the power of Congress exclusive?
141.

The Constitution and laws do not confer, but secure, the right to reclaim fugitive slaves against State legislation. *Johnson v. Tompkins*, Bald. 571; *Giltner v. Gorham*, 4 McLean, 402. The act of 18th Sept. 1850, was constitutional and valid. *Ableman v. Booth*, 21 How. 526; *Sims' Case*, 7 Cush. 285; *Long's Case*, 3 Am. L. J. 201; 1 Blatch. 685; 6 Op. 713.

Was "slave" used in the original Constitution? 226, 21. The term "slave" is not used in the Constitution, and if "person" means "slave," then the Constitution treats slaves as persons, and not as property, and it acts upon them as persons and not as property, though the latter character may be given to them by the laws of the States in which slavery is tolerated. *Lemmon v. People*, 20 N. Y. (6 Smith), 624.

By what character of proceeding is the delivery enforced? 225.

Through the State or the Federal laws?

What resemblance did this clause bear to a treaty?

For what was this clause designed?

How may new States be admitted?

228. "SHALL BE DELIVERED UP."—This contemplates summary and informal proceedings (not a suit), and a *prima facie* case of ownership only. (*Somerset's Case*, 20 State Trials, 79.) Story's Const. § 1812; *Jack v. Martin*, 12 Wend. 511; *Prigg v. Pennsylvania*, 16 Pet. 667; *Sims' Case*, 7 Cush. 731; 2 Story's Const. (3d ed.) pp. 622, 625; *Wright v. Deacon*, 5 S. & R. 62. The delivery is to be through the congressional enactments of Congress; and is not obligatory upon the States, through their executives or authorities. *Prigg v. Pennsylvania*, 16 Pet. 608; affirmed in *Jones v. Vanzandt*, 5 How. 225; *Moore v. Illinois*, 14 How. 13. The student, who may wish to calmly survey this irritating subject, which served chiefly to prepare the public mind for the effort to destroy the Union, but which has ceased to be a matter of agitation since the destruction of slavery, is recommended to read attentively the last-named cases (which are also carefully reported in Story's Const. § 1812*a*, 1812*b*), and *Glen v. Hodges*, 9 Johns. 62; *Wright v. Deacon*, 5 Serg. & R. 62; *Commonwealth v. Griffith*, 2 Pick. 211; *Jack v. Martin*, 12 Wend. 311; S. C. 12 Wend. 507; *Wheeler's Law of Slavery*; *Cobb on Slavery*; *The Debates of 1850, 1860, and 1861*; *The Report of the Committee of Thirty-one in 1861*, and the authorities cited in these notes.

This clause of the Constitution was, in character, precisely a treaty. It was a solemn compact, entered into by the delegates of States then sovereign and independent, and free to remain so, on great deliberation, and on the highest considerations of justice and policy, and reciprocal benefit, and in order to secure the peace and prosperity of all the States. (*Sims' Case*, 7 Cushing (Mass.) 285.) Story's Const. (3d ed.) § 1812*b*, note 1, pp. 615, 616. And see *Miller v. McQuerry*, 5 McLean, 469; *Henry v. Lowell*, 16 Barbour; *Commonwealth v. Griffith*, 2 Pick. 11; *Wright v. Deacon*, 5 Sergt. & Rawle, 62.

This clause was designed to provide a practicable and peaceable mode, by which such fugitive, upon the claim of the person to whom such labor or service should be due, might be delivered up. *Sims' Case*, 7 Cush. 288. The law of 1793 (7 St. 302), for delivering up without trial, was constitutional. *Commonwealth v. Griffith*, 2 Pick. 11; *Wright v. Deacon*, 5 S. & R. 62; *Jack v. Martin*, 12 Wend. 311; *Hill v. Low*, 4 Wash. C. C. 327; *Prigg v. Pennsylvania*, 16 Pet. 539; *Johnson v. Tompkins*, Baldwin, 371; *Jones v. Vanzandt*, 5 How. 215, 229. The fugitive must not only have owed service or labor in another State, but he must have escaped from it. (*Commonwealth v. Fitzgerald*, 7 Law Reports, 379; *Commonwealth v. Avis*, 18 Pick. 193.) *Sims' Case*, 7 Cush. 728.

SEC. III.—[1.] New States may be admitted by the Congress into this Union, but no new State shall be

formed or erected within the jurisdiction of any other State; nor any State be formed by the junction of two or more States, or parts of States, without the consent of the legislatures of the States concerned, as well as of the Congress.

With what restrictions?

229.

470.

229. "NEW STATES" are others than those which formed the Constitution. "States" is here used in a broader sense than in the second and third sections of this article. Out of whatever territory such States may be created, it seems to be settled that it belongs to Congress to determine when a State shall be added to the Union; and when admitted, the State becomes an equal in the Union.

What is a State?

226, 23.

For a history of the subject, see Confederation, *ante*, Art. XI, p. 19; Scott v. Sandford, 19 How. 395; Journals of Convention, p. 222, 305-311; 2 Pitk. Hist. ch. 11, pp. 19, 36; 1 Kent's Com. Lect. 10, pp. 197, 198; 1 Secret Journals of Congress in 1775, 368-386, 433-446; 1 Tuck. Black. Com. App. 383, 386; 6 Journal of Congress, 10th Oct., 1780, p. 213; 7 Id. 1st March, 1781, pp. 43-48; Land Laws U. S. Int. chap.; Story's Const. § 1316. These give the history and the early legislation in regard to the crown lands. And see Federalist, Nos. 38, 42, 43; Am. Ins. Company v. Canter, 1 Pet. 511, 542; The Ordinance of the 13th July, 1787; 3 Story's Laws, App. 2073; 1 Tuck. Black. Com. App. 278, 282; 1 St. And for a very full discussion, see Scott v. Sandford, 19 How. 395. Much of this "Dred Scott" opinion is also given in Story's Const. § 1318, note 1, pp. 193-226. As an historical review, the opinions, and the vast range of discussion which they called forth, are valuable. And see Webster's Speeches, &c., 360-364. From so vast a range, which filled the whole political literature of the country and formed the platforms of political parties, it would be useless to make citations.

This clause enabled Congress to admit new States; it refers to and includes new States to be formed out of this territory, expected to be thereafter ceded by North Carolina and Georgia, as well as new States to be formed out of territory northwest of the Ohio, which then had been ceded by Virginia. Scott v. Sandford (Justice Curtis), 19 How. 611, 612; 2 Story's Const. 3 ed. p. 212.

What territory did the clause include?

The Constitution confers absolutely on the government of the Union the powers of making war and treaties; consequently the power of acquiring territory either by conquest or treaty. (American Insurance Company v. Canter, 1 Pet. 542; see Cerre v. Portot, 6 Cr. 336.) Scott v. Sandford, 19 How. 395; 2 Story's Const. 3d ed. p. 213; Cross v. Harrison, 16 How. 189. And see Fleming v. Page, 9 How. 614.

117, 118, 178.

The Confederate States Constitution imposed this restriction upon the admission of new States into the Confederacy: "Other States may be admitted into the Confederacy by a vote of two-thirds of the whole House of Representatives, and two-thirds of the Senate—the Senate voting by States." Paschal's Annotated Digest, p. 93, impose? Art. IV., sec. 3, cl. 1.

What restriction did the Confederate States impose?

What is the power of Territorial governments as to forming new States?

The territorial legislatures cannot, without permission from Congress, pass laws authorizing the formation of Constitutions and State governments. All measures commenced and prosecuted with a design to subvert the territorial government, and to establish and put in force in its place a new government, without the consent of Congress, are unlawful. But the people of any Territory may peaceably meet together in primary assemblies, or in conventions chosen by such assemblies, for the purpose of petitioning Congress to abrogate the territorial government, and to admit them into the Union as an independent State; and if they accompany their petition with a Constitution framed and agreed on by their primary assemblies, or by a convention of delegates chosen by such assemblies, there is no objection to their power to do so, nor to any measures which may be taken to collect the sense of the people in respect to it: provided such measures be prosecuted in a peaceable manner, in subordination to the existing government, and in subserviency to the power of Congress to adopt, reject, or disregard them at their pleasure. 2 Opin. 726. And see the practice in the admission of Maine, Vermont, Tennessee, Kentucky, and all the States since, including West Virginia; from the differences in which it would appear that there is no uniform rule for the admission of new States. Hickey's Const. ch. 8, p.

What new States have been admitted, and when?
Vt. & Ky.?

230. Under this section the following States have been admitted:—

VERMONT, formed from part of New York, by act of Feb. 18, 1791, which took effect March 4, 1791. 1 Stat. 191; Brightly's Dig. 894. KENTUCKY, formed from part of Virginia; by act of Feb. 4, 1791, which took effect June 1, 1792. 1 Stat. 189; Brightly's Dig. 455. TENNESSEE, formed from territory ceded to the U. S. by North Carolina, by act of June 1, 1796, which took effect from date. 1 Stat. 491; Brightly's Dig. 863. OHIO, formed from territory ceded to the U. S. by Virginia, by act of Feb. 19, 1803, which took effect from date. 2 Stat. 201; Brightly's Dig. 708. LOUISIANA, formed from part of the territory purchased of France, by treaty of April 30, 1803; by act of April 8, 1812, which took effect from date. 2 Stat. 701; Brightly's Dig. 582. INDIANA, formed of part of territory ceded to the U. S. by Virginia, by act of Dec. 11, 1816, which took effect from date. 3 Stat. 399; Brightly's Dig. 416. MISSISSIPPI, formed from part of the territory ceded to U. S. by Georgia and South Carolina, by act of Dec. 10, 1817, which took effect from date. 3 Stat. 472; Brightly's Dig. 640. ILLINOIS, formed from part of the territory ceded to U. S. by Virginia, by act of Dec. 3, 1818, which took effect from date. 3 Stat. 536; Brightly's Dig. 310. ALABAMA, formed from part of the territory ceded to United States by Georgia and South Carolina, by act of Dec. 14, 1819, which took effect from date. 3 Stat. 608; Brightly's Dig. 29. MAINE, formed from part of Massachusetts, by act of March 3, 1820, which took effect March 15, 1820. 3 Stat. 544; Brightly's Dig. 590. MISSOURI, formed from part of the "Louisiana Purchase," by act of March 2, 1821; which took effect Aug. 10, 1821. 3 Stat. 645; Brightly's Dig. 617. ARKANSAS, formed

from part of the "Louisiana Purchase," by act of June 15, 1836, Louisiana. which took effect from date. 5 Stat. 50; Brightly's Dig. 45. MICHIGAN, formed from part of the territory ceded to United States Michigan? by Virginia, by act of June 15, 1836, which took effect from date. 5 Stat. 49; Brightly's Dig. 614. FLORIDA, formed from territory Florida? purchased from Spain under treaty of Feb. 22, 1819, by act of March 3, 1845, which took effect from date. § 1, 5 Stat. 742; Brightly's Dig. 288. IOWA, by act of March 3, 1845, which took Iowa? effect from date. 5 Stat. 742; boundaries readjusted, Aug. 4, 1846. § 1, 9 Stat. 52. Readmitted Dec. 28, 1846. 9 Stat. 117, § 1; Brightly's Dig. 442, 444. TEXAS, an independent republic, annexed Texas? Dec. 29, 1845, by act of that date. 9 Stat. 1; Brightly's Dig. 872; Calkin v. Cocke, 14 How. 227; Paschal's Dig. 46, note 159. WIS- Wisconsin? CONSID, by act of May 29, 1848, which took effect from date. 9 Stat. 57; Brightly's Dig. 906. CALIFORNIA, formed from part of the ter- California? ritory ceded to U. S. by Mexico, by treaty of Hidalgo, Feb. 3, 1848; by act of Sept. 9, 1850. 9 Stat. 452; Brightly's Dig. 105. MINNESOTA, Minnesota? formed from part of the "Louisiana Purchase," by act of May 11, 1858, which took effect from date. 11 Stat. 285; 2 Brightly's Dig. 301. OREGON, see Treaties of the U. S. with France, of April 30, Oregon? 1803, with Spain, Feb. 22, 1819; with Great Britain, June 15, 1846; admitted by act of Feb. 14, 1859. 11 Stat. 383; Brightly's Dig. 349. KANSAS, formed from part of the "Louisiana Purchase," by act of Kansas? Jan. 29, 1861, which took effect from date. 12 Stat. 126; Brightly's Dig. 273. WEST VIRGINIA, formed of certain counties of Virginia, West Va.? by act of Dec. 31, 1862. 12 Stat. 633; admitted by same act, to date from June 20, 1863, by proclamation of the President. Appendix, 12 Stat. ii. NEVADA, formed from part of California. Nevada? by act of March 21, 1864. 13 Stat. 32. To take effect, Oct. 31, 1864, the date of proclamation of the President. Appendix, 13 Stat. ii. NEBRASKA, formed from part of the "Louisiana Pur- Nebraska? chase," by act of Feb. 9, 1867, which took effect from date. 14 Stat. 391.

For the enabling acts and manner of admission, see Hickey's Constitution, chap. 10, pp. 405-449. And see Cross v. Harrison, 16 How. 189.

All Congress intended (by the enabling act of 1811), was to declare in advance to the people of the territory, the fundamental principles which their Constitution should contain; this was very proper under the circumstances; the instrument having been duly formed and presented, it was in the national legislature to judge whether it contained the proper principles, and to accept it if it did, or reject it if it did not. Having accepted the Constitution and admitted the State, "on an equal footing with the original States," in all respects whatever in express terms, by the act of 1812. Congress was concluded from assuming that the instructions contained in the act of 1811, had not been complied with. No fundamental principles could be added by way of amendment, as this would have been making part of the State Constitution. If Congress could make it in part, it might, in form of amendment, make it entire. *Permoli v. First Municipality*, 1 How. 610. But see the act of Congress of 9th Feb., 1867, requiring the agreement by the legislature

What is the object of an enabling act?

What is the effect of the acceptance of the Constitution?

17, 18.

of Nebraska, to the fundamental principle, that there should be no distinction, as to the right of suffrage, on account of color. 14 St. 392, and *Id.* App. iv.

What is the power over the territory and other public property of the United States?
471-473.

[2.] The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State.

What is "to dispose of"?

231. "TO DISPOSE OF."—In other words, to make sale of the lands, or to raise money from them. *Scott v. Sandford*, 19 How. 615; S. C. 2 Story's Const. 3 ed. p. 196.

How limited?

The power of Congress to "dispose of" the public lands, is not limited to making sales; they may be leased. *United States v. Gratiot*, 1 McLean, 454; 14 Pet. 526; 4 Opin. 487. But no property belonging to the United States can be disposed of except by the authority of an act of Congress. *United States v. Nicol*, 1 Paine, 646.

Define "needful rules and regulations"?
138.

"AND MAKE ALL NEEDFUL RULES AND REGULATIONS."—"Needful," here may well be compared with "*necessary and proper*," in the 18th clause of Art. I. Sec. 8. And as Congress can only authorize dispositions by legislative enactments, so the "needful rules," must mean the appropriate legislation touching the subject-matter. See *Justice Curtis* in *Scott v. Sandford*, 19 How. 615; 2 Story's Const. 3d ed. p. 213.

28, 29, 129.

The words "RULES AND REGULATIONS," are usually employed in the Constitution in speaking of some particular specified power which it means to confer on the government, and not, as we have seen, when granting general powers of legislation. As to make "rules" for the government and regulation of the land and naval forces; to "*regulate* commerce;" "to establish an uniform *rule* of naturalization;" "to coin money and *regulate* the value thereof."

85, 93, 99,
100.

211.

In all these, as in respect to the Territories, the words are used in a restricted sense. (*Scott v. Sandford*, 19 How. 437.) 2 Story's Const. 3d ed. pp. 196, 213.

Define "territory"?
222-228.

"RESPECTING THE TERRITORY."—TERRITORY. [Fr. *Territoire*; It. and Sp. *Territorio*; Lat. *Territorium*; from *terra*, land.] 1. The extent, or compass of land within the bounds, or belonging to the jurisdiction, of any State, city, or other body. 2. A tract of land belonging to or under the dominion of a prince or State, at a distance from the parent country or the seat of government, &c. Webster's Dic., TERRITORY. Called by Pomponius in the Digests, the whole amount of the lands within the limits of any State (*universitas agrorum intra fines cujusque civitatis*). (Dig. 50, 16, 239, 8.) Burrill's Law Dic., TERRITORIUM; *United States v. Bevans*, 3 Wheat. 386; *Justice Curtis* in *Scott v. Sandford*, 19 How. 615; 2 Story's Const. p. 211. It applied only to the "*property*" which the States held in common at that time, and had no reference whatever to any "territory," or other property which the new sovereignty might after-

ward itself acquire. *Scott v. Sandford*, 19 How. 615; S. C. 2 472.
 Story's Const. 3d ed. p. 196. The term "territory," as here used, To what is
 is merely descriptive of one kind of property, and is equivalent to the word "lands." *United States v. Gratiot*, 14 Pet. 537. This the word
 clause applies only to territory within the chartered limits of some equivalent?
 one of the States, when they were colonies of Great Britain. It
 does not apply to territory acquired by the present federal govern-
 ment, by treaty or conquest, from a foreign nation. *Scott v. Sand-*
ford, 19 How. 395; S. C., Story's Const. § 1318, 3d ed. p. 193.
 But see *Justice Curtis' Opinion*, 2 Story, 3d ed. p. 211.

It does not speak of *any territory*, nor of *territories*, but uses
 language which, according to its legitimate meaning, points to a
 particular thing. The power is given in relation only to *the* territory
 of the United States, that is, to territory then in existence, and
 then known or claimed as the territory of the United States.
Scott v. Sandford, 19 How. 436; S. C. 2 Story's Const. 3d ed. p. 196.

The power of governing a territory belonging to the United Does the
 States, which has not, by becoming a State, acquired the means of power to
 self-government, has been said to result necessarily from the facts govern re-
 that it is not within the jurisdiction of any particular State, and sult from
 is within the power and jurisdiction of the United States. The the power to
 power to govern seems to be the inevitable consequence of the acquire?
 right to acquire territory. *American Insurance Co. v. Canter*, 1 233.
 Pet. 542-3; *United States v. Gratiot*, 14 Id. 537; *Cross v. Har-*
rison, 16 How. 194; *Whiting*, 331. Congress has the constitu-

tional power to pass laws punishing Indians (within their territory)
 for crimes and offenses committed against the United States. The
 Indian tribes are not so far independent nations as to be exempt
 from this kind of legislation. *United States v. Cha-to-kah-na-pe-*
sha, Hemp. 27. The United States, under the present Constitution,
 cannot acquire territory to be held as a colony, to be governed at
 its will and pleasure. But it may acquire territory which, at the
 time, has not the population that fits it to become a State, and
 may govern it as a territory until it has a population which, in
 the judgment of Congress, entitles it to be admitted as a State
 of the Union. During the time it remains a territory, Congress 220-223.
 may legislate over it within the scope of its constitutional powers,
 in relation to citizens of the United States, and may establish a
 territorial government; and the form of this local government
 must be regulated by the discretion of Congress, but with power
 not exceeding those which Congress itself, by the Constitution, is
 authorized to exercise over citizens of the United States, in respect
 to their rights of person or rights of property. The territory thus
 acquired, is acquired by the people of the United States, for their
 common and equal benefit; and every citizen has a right to take
 with him into the territory any article of property, including his
 slaves, which the Constitution recognizes as property, and pledges
 the federal government for its protection. *Scott v. Sandford*, 19
 How. 395. The country dedicated to Indian purposes still re-

mains a part of the territory of the United States, subject to its What is the
 laws. *The United States v. Rogers*, 4 How. 567. And the power power over
 exists to punish crimes committed in that country, whether the Indian
 perpetrated by Indians or whites. *Id.* And see 6 Op. territory?

What is the
general
rule?

It will be seen that the principle stated by Chief-Justice Taney, in *United States v. Rogers*, 4 How. 567, recognizes the plenary power of Congress to legislate for the Territories—that is, as stated in the *American Insurance Co. v. Canter*, 1 Pet. 542, all the powers which both Congress and the State legislatures combined, possess in the States. But in the *Dred Scott Case* he limits the power, and confines its exercise to the country ceded before the adoption of the Constitution. But in the case of the *United States v. Rogers*, 4 How. 567, the territory under discussion was part of that acquired from Louisiana. In reference to this territory, as well as that acquired from Georgia, Spain, Mexico, and Russia, there has been no distinction in regard to the character of legislation. Congress has exercised *power* both as to crimes and civil and political rights. The organized territorial governments have been treated as inchoate States for some purposes. Slavery has been tolerated or prohibited, according to circumstances. And now that the agitating question of slavery is out of the way, the author would venture to suggest that the country will settle down upon the principle that organized “Territory” carries along the idea of power and jurisdiction; and that Congress has the right to organize governments there, “making rules” which shall not be inconsistent with the Constitution of the United States; and exercising all the power over the inhabitants, no more, no less, which may be exercised over the States; not exclusive legislation as in the District, and forts, and arsenals; but all the legislation which may be necessary and proper to guarantee the principles of republican government; and to insure the erection and admission of new States, with those principles. The failure has been in observing, that an organized territorial government is for all purposes of municipal legislation, a State, and has been so recognized in many ways. And the supervision of Congress over such legislation is no greater than the national supervision over unconstitutional legislation by the States. The only difference is in the mode of revision and redress. See *Scott v. Sandford*, 19 How. 395–633; 2 Story’s Const. pp. 205, 214–218.

Define “all”
and “need-
ful”?

In *Scott v. Sandford*, Mr. Justice Curtis insisted that “ALL” meant *all*; that Congress alone could judge of what was “NEEDFUL.” But the majority denied that “ALL” included the right to make a rule excluding slavery; or rather, it was denied that a cession of territory cedes the legislative jurisdiction for any other purpose than to dispose of the property in the land. See 19 How. pp. 615, 616; Story’s Const. 3d ed. p. 214. The difference of opinion cannot be more strongly stated than in these words:—“I construe this clause, as if it read: Congress shall have power to make all needful rules and regulations respecting those tracts of country out of the limits of the several States, which the United States have acquired, or may hereafter acquire, by cessions, as well of the jurisdiction as of the soil, so far as the soil may be the property of the party making the cession, at the time of making it.” Justice Curtis, 2 Story’s Const. 3d ed. p. 213. The opposite view was expressed in these words:—

“2. The Congress shall have power to dispose of and make all

needful rules and regulations concerning the property of the Confederate States, including the lands thereof. Confederate States.

3. The Confederate States may acquire new territory, and Congress shall have power to legislate and provide governments for the inhabitants of all territory belonging to the Confederate States, lying without the limits of the several States, and may permit them, at such times and in such manner as it may by law provide, to form States to be admitted into the Confederacy. In all such territory the institution of negro slavery, as it now exists in the Confederate States, shall be recognized and protected by Congress, and by the territorial government; and the inhabitants of the several Confederate States and Territories shall have the right to take to such Territory any slaves lawfully held by them, in any of the States or Territories of the Confederate States." Paschal's Annotated Digest, p. 93, Art. IV., Sec. III., Cl. 2, 3. How did the Confederate Constitution differ from this?

This was making the Constitution precisely what this school contended the Dred Scott decision had settled that it was. The power to acquire and govern territory seems to grow out of the war power and to rest upon constitutional principles. Fleming v. Page, 9 How. 614; Cross v. Harrison, 16 How. 189.

232. "OR OTHER PROPERTY BELONGING TO THE UNITED STATES." What is —"PROPERTY" (*Proprietas, proprius*) is the most comprehensive word of dominion or ownership. See Webster's Dic., PROPERTY. It is the right to dispose of the substance of a thing in every legal way, to possess it, to use it, and to exclude every one else from interfering with it. (Mackeld Civil Law, 269, § 259; Bell's Dict.; Taylor's Civil Law, 476; 2 Bl. Com. 15.) Burrill's Law Dic., PROPERTY.

And the same power of making needful rules respecting the territory is, in precisely the same language, applied to the *other* property belonging to the United States—associating the power over the territory in this respect with the power over movable or personal property—that is, the ships, arms, and munitions of war, which then belonged in common to the State sovereignties. And it will hardly be said, that this power, in relation to the last-mentioned objects, was deemed necessary to be thus specially given to the new government, in order to authorize it to make needful rules and regulations respecting the ships it might itself build, or arms and munitions of war it might itself manufacture or provide for the public service. (Scott v. Sandford, 19 How. 436.) 2 Story's Const. 3d ed. p. 196, and § 1324, 1325.

By this conquest (the acquisition of New Mexico, in 1846), this substitution of a new supremacy, although the former political relations of the inhabitants were dissolved, their private relations, their rights, vested under the government of their former allegiance, or those arising from contract or usage, remained in full force and unchanged, except so far as they were in their nature and character found to be in conflict with the Constitution and laws of the United States, or with any regulation which the conquering power, and occupying authority should ordain. Leitensdorfer v. Webb, 20 How. 336. 473.

To what did the saving clause refer?

"AND NOTHING IN THIS CONSTITUTION SHALL BE SO CONSTRUED AS TO PREJUDICE THE CLAIMS OF THE UNITED STATES OR OF ANY PARTICULAR STATE."—This member of the clause applied to the claims of North Carolina and Georgia, and could apply to nothing else. *Scott v. Sandford*, 19 How. 437; 2 Story's Const. 3d ed. p. 197. It was to exclude the conclusion that either party would surrender their rights. *Id.* and p. 212.

How is republican form of government &c., guaranteed?
474-476.

SEC. IV.—The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened), against domestic violence.

Why "the United States"?

233. "THE UNITED STATES."—This is the only instance in the Constitution where the government, by its corporate name, has covenanted for any duty. The "*powers*" of the government are vested in the respective departments thereof; and, as to the "necessary and proper" legislation, that is specially conferred upon Congress. Here the obligation is from the "United States" to the "States;" but whether to be exercised by Congress or the President, is one of the questions which has grown out of the reconstruction measures.

14, 15, 165, 195.

138, 275-279.

One of the grounds of impeachment alleged against the President was the usurpation of this power. The Report on Impeachment of the President, 55. In the case of *Luther v. Borden*, 7 How. 42, Chief-Justice Taney said: "It rests with Congress to decide what government is the established one in a State. For, as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not. And when the senators and representatives of a State are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal." Quoted and approved. *Ex parte Coupland*, 26 Tex. 434; *Federalist*, No. 21, p. 112.

What department is to decide such political questions?

195.

Define "to guarantee"?

"SHALL GUARANTEE."—[*L. Lat. quarrantar, quarrantisare.*]—To become responsible for; to warrant; to undertake for another, that, if that other does not do the thing, the party guaranteeing will himself do it. The obligation of a guaranty is essentially in the alternative. *Britton*, chap. 75; 3 *Kent's Com.* 121; *Story on Contracts*, § 852; *Fell on Guaranties*, 1. The word seems to be essentially the same with warranty. *Id.* *Burrill's Law Dic.*, GUARANTY, or GUARANTEE. For a technical and limited signification, see *Parker v. Culvertson*, 1 Wall. Jr. Ct. Ct. 149, 153.

220-233, 226, 229-232.

"TO EVERY STATE IN THIS UNION."—State here also means as well the States which agreed to the Constitution, as also the inchoate States or organized territories, and the new States, since admitted, or

hereafter to be admitted. A "State" (for the purpose of the judicial power) must be a member of the Union. It is not enough to be an organized political body within the limits of the Union. *Scott v. Jones*, 5 How. 343, 377; *Cherokee Nation v. Georgia*, 5 Pet. 18. But this is not so, as to the guaranty of a republican form of government. That is in favor of the people—the citizens—as well as the States.

205.

"A REPUBLICAN FORM OF GOVERNMENT."—A government of the people; it is usually put in opposition to a monarchical or aristocratic government. This clause supposes a government already established, and this is the form of government the United States have undertaken to guarantee. (*Story's Const.* § 1807.) Burrill's Law Dic., REPUBLICAN GOVERNMENT.

What is a republican form of government? 475.

This term has of course received no practical authoritative definition. It supposes a pre-existing government of the form which is to be guaranteed. As long, therefore, as the existing republican forms are continued by the States, they are guaranteed by the federal Constitution. Whenever the States may choose to establish other republican forms, they have a right to do so, and to claim the federal guaranty for the latter. The only restriction imposed on them is, that they will not exchange republican for anti-republican constitutions; a restriction which it is presumed will hardly be considered as a grievance. (*Federalist*, No. 21; see *Montesquieu*, B. 9, chap. 1, 2; 1 *Tuck. Black. App.* 366, 367.) *Story's Const.* § 1817; *Federalist*, No. 43, pp. 214, 215. But this still leaves the term undefined, except so far as the description may be derived from the character of the State governments when they formed this Constitution. The restrictions which they had imposed upon themselves, and to which they agreed when they made this Constitution the supreme law; and the rights of the citizens secured by the amendments, which constitute a Bill of Rights. The first guaranty is the elective principle. But upon whom the elective franchise shall be conferred is not defined, and must be controlled by circumstances. The right need not be universal; and must not be too restricted. The next is, the model, upon which all our governments are based, legislative, executive, and judicial. Certainly the guaranty is to enforce upon the States the restrictions imposed upon them in the federal Constitution; that is, the States shall not exercise the prohibited powers, nor the powers which have been granted to and exercised by Congress. And now, practically, we have the great examples, that where States deny the obligation of the federal Constitution, and form a confederation among themselves upon the same model, although they may retain the same forms and constitutions of the State governments, yet the United States have regarded it as an occasion for the exercise of this power; have declared such existing State governments as in fact not republican; have annulled them, and have required new Constitutions to be formed, based upon the organic change, which had destroyed slavery, and thus settled that it was no longer a republican institution. About the *right* to exercise this power, there has been no dispute. Unfortunately, the controversy has been, as to what department of the government of the United States

To what does the guaranty extend?

What is the restriction?

233-241.
245-275.
16-18.

How is it affected by the elective principle?

16-18.

275-278.

139-143.

71-138.

What has been the effect of the rebellion?

274-276, 279.

Who shall judge.

shall judge of the necessity and apply the remedy, and what shall be the extent of the organic changes in the States? If the practice and common understanding in the admission of new States, and the precedent of *Luther v. Borden*, 7 How. 1, are to control, then the question would seem to be settled in favor of the power of Congress to determine when a State government is republican in form and in practice.—[EDITOR. See President Lincoln's proclamation of 1st Jan., 1863, and the amnesty proclamations, and the proclamations of President Johnson, appointing provisional governors; his directions declaring what the State conventions shall do, and declaring civil government restored. See also his messages and veto messages upon the subject; the debates of the thirty-ninth and fortieth Congresses everywhere; the President's Message to the second session of the fortieth Congress, Dec. 3, 1867; the reports of the joint committee upon reconstruction; the reconstruction acts; the majority and minority reports of the committee on judiciary upon the impeachment of the President, and the debates of the thirty-ninth and fortieth Congresses thereon. McPherson's Manual, and Paschal's Annotated Digest, note 1174.

275-277.

"I take it that the States would not be allowed to establish primogeniture; to abolish the trial by jury *in all cases*; to unite the Church and State; nor in any way to violate the great cardinal principles of liberty secured by the national Bill of Rights, and which the fourteenth amendment seeks to extend to the States. I cannot subscribe to the omnipotence of a State legislature, or that it is absolute and without control, although its authority should not be restrained by the Constitution or fundamental law of the State. The nature and end of legislative power will limit the exercise of it. This fundamental principle flows from the very nature of our free republican governments, that no man should be compelled to do what the law does not require, *nor refrain from doing that which the law permits*. There are certain vital principles in our free republican governments, which will determine and overrule an apparent flagrant abuse of legislative power, such as to authorize manifest injustice by a positive law, or to take away that security for personal liberty or private property, for the protection whereof government was established." (*Calder v. Bull*, 3 Dall. 386.)

What laws would infract the principles of a republican form of government?

143, 156-161.

Wynehamer v. The People, 13 N. Y. (3 Kern.), 391, 392. The cases of *ex post facto* law; impairing contracts; making a man accuse himself; taking A's property to give to B; punishing innocence as guilt, and violating property, cited. (*Calder v. Bull*, 3 Dall. 386; *Fletcher v. Peck*, 3 Cranch, 385; *Dash v. Van Kleeck*, 7 Johns. 477; *Taylor v. Porter*, 4 Hill, 146; *Goshen v. Stonington*, 4 Conn. 225.) *Wynehamer v. The People*, 13 N. Y. 391, 392. See *Wilkinson v. Leland*, 2 Pet. 653; *Harding v. Goodlet*, 3 Yerg. 41; 2 Kent's Com. 11th ed. p. 339, and notes.

That State must not boast of its civilization, nor of its progress in the principles of civil liberty, where the legislature has power to provide that a man may be condemned unheard. *Oakley v. Aspinwall*, 4 Comstock, 522.

What is invasion?

234. "AND SHALL PROTECT EACH OF THEM AGAINST INVASION."—Invasion has been defined in note 133. The means to be

employed are the whole powers of declaring war and its incidents. 233.
See Act of 12th Jan. 1862, 12 St. 589, 590. The latitude of expres- 117-133.
sion here used, secures each State not only against foreign hostility,
but against ambitious or vindictive enterprises of its more power-
ful neighbors. Story's Const. § 1818; Federalist, No. 43, p. 215.

235. "AND ON THE APPLICATION OF THE LEGISLATURE, OR OF THE EXECUTIVE (WHEN THE LEGISLATURE CANNOT BE CONVENED), AGAINST DOMESTIC VIOLENCE."—The President must determine what body of men constitute the legislature, and who is the governor; which is the government and which party is unlawfully arrayed against it, before he can act. Luther v. Borden, 7 How. 43-45. The history of the rebellion affords us these examples: 1. The case of Virginia. A large majority of the legislature of the State adhered to the rebellion, and after an ordinance of secession Virginia became one of the "Confederate States of America." But Congress recognized the minority of the legislature assembled at Wheeling as the legislature of Virginia, with authority to consent to the creation of the new State of West Virginia, which was admitted into the Union. 2. In the case of Missouri. The majority of the legislature and the governor adhered to the rebellion; and, after the commencement of hostilities, passed an ordinance of secession; and the legislature elected senators, and a minority of the people elected representatives to the Confederate Congress at Richmond. This was in accordance with an enabling act of that Congress, and the State was admitted as a member of the "Confederate States," and continued to be represented until the overthrow of the rebellion. On the other hand, Missouri retained its place in the Union through the agency of a convention elected by the authority of an act of the legislature passed in 1860, which convention, having refused to pass an ordinance of secession, was reconvened upon the call of its president, and was recognized as the lawful authority of Missouri by the government of the United States. 3. In the case of Kentucky. The legislature refused to call a convention or to pass an ordinance of secession. But a convention of rebels did assemble and pass an ordinance of secession; and senators and representatives were elected to the Congress of the "Confederate States," who served until the close of the rebellion. 4. Louisiana. This was one of the seven original seceded States which adopted the Confederate Constitution ordained at Montgomery, Alabama, in 1861. After the occupation of Louisiana by the federal troops, a quorum of the rebel legislature could not be obtained. But it was solemnly decided by the Supreme Court of Louisiana, that so long as a single parish remained loyal to the Confederacy, such parish, or minority of the people, should be regarded as the State of Louisiana; and that the conquered districts of the State were lost to it, and would so remain until reconquered or restored by a treaty of peace. 5. Arkansas and Tennessee had the same history as Louisiana. And yet all these practically dissolved corporations and their exiled governors continued to be recognized by the Confederate government as the lawful authorities of those States. 6. Maryland. The majority of the legislators being known to side with the rebellion, the assemblage of

Who are
the Legisla-
ture?
233, 234.

476.

Give the
example of
Virginia?

229, 230.

Of Mis-
souri?

Of Ken-
tucky?

Of Louisi-
ana?

Arkansas
and Tennes-
see?

Of Mary-
land?

What is the doctrine upon which the country is estopped? that body was prevented by the military power of the United States. Therefore, the country seems to be *estopped* upon the doctrine, that when the exigencies of the republic require it, the government of a State, whether regular or irregular, majority or minority, which adheres to the Union and acknowledges the supremacy of the federal Constitution, will be recognized and treated as the lawful legislature and executive entitled to the guaranty to be protected.

"AGAINST DOMESTIC VIOLENCE."—By the first act of Congress to secure this guaranty (28th Feb., 1795, 1 Stat. 424), it is provided, that "in case of an insurrection in any State against the government thereof, it shall be lawful for the President of the United States, on application of the legislature of such State, or of the executive (when the legislature cannot be convened), to call forth such number of the militia of any State, or States, as may be applied for, as he may judge sufficient to suppress such insurrection." *Luther v. Borden*, 7 How. 43; *Brightly's Digest*, p. 440, § 1-4.

What is "domestic violence"? If there be an armed conflict, it is a case of "domestic violence," and one of the parties must be in insurrection against the lawful government. As the law gives a discretionary power to the President, to be exercised by him upon his own opinion of certain facts, he is the sole and exclusive judge of the existence of those facts. If he err, Congress may apply the proper remedy. But the courts must administer the law as they find it. (*Martin v. Mott*, 12 Wheat. 29-31.) *Luther v. Borden*, 7 How. 44, 45. And see Act of 12th July, 1861. 12 St. 257; 2 *Brightly's Dig.* 1231, Tit. INSURRECTION; *United States v. One hundred packages*, 11 Am. L. R. 419; *Kulp v. Ricketts*, 20 Leg. Int. 228; *Valdigham's Trial*, 259; *Hodgson v. Millwood*, 20 Leg. Int. 60, 164; *Ohio v. Bliss*, 10 Pittsburgh L. J. 304. The acts upon "INSURRECTION" are fully collected in 2 *Brightly's Dig.* p. 1230-1239. The framers of the Constitution seemed to have looked to the possibility of domestic violence by the slaves. *Federalist*, No. 43, p. 246.

ARTICLE V.

How are amendments to be made? The Congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two-thirds of the several States, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three-fourths of the several States, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress;

provided, that no amendment, which may be made prior to the year one thousand eight hundred and eight, shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no State, without its consent, shall be deprived of its equal suffrage in the Senate. 477.

236. CONGRESS MAY PROPOSE AMENDMENTS, &c.—These terms need no definition. Upon a call of Congress in regard to the submission of the fourteenth amendment to the legislatures of the States, President Johnson more than intimated an opinion, that the resolution proposing the amendment ought to be submitted to the President's approval. But the practice has been otherwise; and as the reason for such a rule is superseded by the "two-thirds" vote, the rule itself ought to cease. It has been held that the approval of the President is not necessary. *Hollingsworth v. Virginia*, 3 Dall. 378. All the amendments have been proposed to the legislatures; none to conventions of the States. See *Federalist*, No. 43; *Story's Const.* § 1826-1831; 1 *Tucker's Black. Com. App.* 371, 372. The amendments when made are binding upon the States. 244, 274, 275. 242.

ARTICLE VI.

[1.] All debts contracted, and engagements entered into, before the adoption of this Constitution, shall be as valid against the United States, under this Constitution, as under the Confederation. What debts did the United States assume?

237. UNITED STATES TO PAY THE DEBTS OF THE CONFEDERATION.—This was but asserting a principle of moral obligation, which always applies to revolutions. See *Story's Const.* § 1832-1835; *Journal of Convention*, 291; *Jackson v. Lunn*, 3 *Johns. Cases*, 109; *Kelly v. Harrison*, 2 *Id.* 29; *Terrett v. Taylor*, 9 *Cr.* 50; *Rutherford Inst. B.* 2, ch. 9, § 1, 2; ch. 10, § 14, 15; *Vattel*, *Prelim. Dis. ch.* 1, § 1; ch. 5, § 64; ch. 14, § 214-216; *Grotius*, B. 2, ch. 9, § 8, 9; *Federalist*, Nos. 43, 84; 1 *Tuck. Black. Com. App.* 368; *Confederation*, Art. XII. *ante*, p. 19. Explained.

The principle is, that revolution ought to have no effect whatsoever upon private rights and contracts, or upon the public obligations of nations. *Terrett v. Taylor*, 9 *Cr.* 50.

[2.] This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall What is the supreme law of the land?

Bound.
478.

be bound thereby, any thing in the Constitution or laws of any State to the contrary notwithstanding.

What is
the Consti-
tution?
2.
195, 242.
2, 67, 68.

238. THIS CONSTITUTION creates the government. Of course it stands paramount. And if any law of Congress, treaty, or State law, be found to be a plain infraction of this Constitution, they will be held to be void. The object was to establish a government which, to the extent of its powers, is supreme. Story's Const. § 1837; *Ableman v. Booth*, 21 How. 517, 520. A law, by the very meaning of the term, includes supremacy. Story's Const. § 1837. And the government must be strong enough to execute its own laws, by its own tribunals. *Ableman v. Booth*, 21 How. 517. The supremacy could not peacefully be maintained unless clothed with judicial power. *Id.* 518, 519. This clause fully compared with the judicial power. *Id.*

179, 245.
195-198.

What is a
law?

239. "AND ALL LAWS OF THE UNITED STATES WHICH SHALL BE MADE IN PURSUANCE THEREOF."—A LAW is a solemn expression of legislative will. Louisiana Civil Code, Art. I. It is a rule of action. It is a rule of civil conduct prescribed by the "supreme" power in a State. 1 Bl. Com. 44; 1 Kent's Com., Lect. XX. p. 447. It includes supremacy. Story's Const. § 1738. See *Federalist*, Nos. 33, 64; *Gibbons v. Ogden*, 9 Wh. 210, 211; *McCulloch v. Maryland*, 4 Wh. 405, 406. All such laws, made by the general government, upon the rights, duties, and subjects specially enumerated and confided to their jurisdiction, are necessarily exclusive and supreme, as well by express provision as by necessary implication. *Sims' Case*, 7 Cush. 729. And the general government has the power to cause such laws to be carried into full execution, by its own powers, without dependence upon State authority, without any let or restraint imposed by it. *Id.*

246.

195, 208.

211.

183.

478.

A law is made in pursuance of the Constitution, whenever it is enacted by a constitutional quorum of Congress and approved by the President; or, being returned with his objections, is passed over the veto by the necessary two-thirds vote. It then becomes the supreme law; and is generally regarded as binding until decided to be unconstitutional by the Supreme Court of the United States, in a proper case arising upon the law.

After grave consideration, cases might arise where, after the laws had been passed, with all constitutional forms and time, and placed on statute books, it would be the duty of the executive to refuse to carry them out, regardless of consequences. This would be involving the country in a justifiable civil war. President Johnson's Message, 3d Dec., 1867. The editor cannot give this sentiment without expressing his disbelief in its correctness.

The sovereignty to be created was to be limited in its powers of legislation, and if it passed a law not authorized by its enumerated powers, it was not to be regarded as the supreme law of the land, nor were the State judges bound to carry it into execution. And as the courts of a State, and the courts of the United States, might, and certainly would, often differ as to the extent of the powers conferred by the government, it was manifest that serious controversies would arise between the authorities of the United States and of the

States, which must be settled by force of arms, unless some tribunal was created to decide between them finally and without appeal. *Ableman v. Booth*, 21 How. 519, 520. The Supreme Court of the United States shown to be that tribunal. Id. 520-526. 133.

And no power is more clearly conferred by the Constitution and laws of the United States, than the power of this court to decide, ultimately and finally, all cases arising under such Constitution and laws, &c. Id. 525.

240. A TREATY is a solemn agreement between nations. Foster v. Neilson, 2 Pet. 314. Define a treaty? 178.

Whenever a right grows out of, or is protected by, a treaty, it is sanctioned against all the laws and judicial decisions of the States; and whoever may have this right, it is to be protected. *Owing v. Norwood's Lessee*, 5 Cr. 348; *People v. Gerke*, 4 Am. L. R. 604; 6 Opin. 291. But though a treaty is a law of the land, and its provisions must be regarded by the courts as equivalent to an act of the legislature when it operates directly on a subject, yet, if it be merely a stipulation for future legislation by Congress it addresses itself to the political and not to the judicial department, and the latter must await the action of the former. *Foster v. Neilson*, 2 Pet. 253. "Shall be confirmed," was construed to act presently on the perfect Spanish grants. Id. A treaty ratified with proper formalities, is, by the Constitution, the supreme law of the land, and the courts have no power to examine into the authority of the persons by whom it was entered into on behalf of the foreign nation. *Doe v. Braden*, 16 How. 635. Though a treaty is the law of the land, under the Constitution, Congress may repeal it, so far as it is municipal law, provided its subject-matter be within the legislative power. *Taylor v. Morton*, 2 Curt. C. C. 454; *Talbot v. Seaman*, 1 Cr. 1; *Ware v. Hylton*, 3 Dall. 361; *Story's Const.* § 1838. What is the rule as to treaties? 195.

A treaty concluded by the President and Senate binds the nation, in the aggregate, and all its subordinate authorities, and its citizens as individuals, to the observance of the stipulations contained in it. (*Ware v. Hylton*, 3 Dall. 199; *Worcester v. Georgia*, 6 Pet. 575.) What is the obligation of a treaty? *Fellows v. Dennison*, 23 N. Y. R. (9 Smith), 427.

"SUPREME LAW OF THE LAND."—The highest law; that which binds all the people of the nation, and cannot be abrogated by the States. It was intended to declare that, to the extent of its powers, the Constitution, laws, and treaties of the United States, are prescribed by the "supreme power of the State," and are supreme. This power of the government can be exercised by Congress, or, to the extent of the treaty-making power, by the President and Senate. The national rule of action then is: 1. The Constitution; 2. Acts of Congress; 3. Treaties; 4. The judicial decisions as precedents. The State constitutions, laws, and decisions on, are subordinate to these. See *Ableman v. Booth*, 21 How. 525; *Story's Const.*, § 1836-1841; *Federalist*, No. 33; *Gibbons v. Ogden*, 9 Wheat. 210, 211; *McCulloch v. Maryland*, 4 Wheat. 405, 406; *Letter of Congress*, 13th April, 1787; 12 *Journal of Congress*, 32-36; 1 *Wirt's State Papers*, 45, 47, 71, 81, 145; *Sergt's Const.* ch. 21, pp. 212, 219; ch. 34, pp. 406, 407; *Ware v. Hylton*, What is the supreme law? 2, 6, 233. What is the national rule of action?

How is a treaty to be regulated? 195. 3 Dall. 270-277; Journal of Convention, 222, 282, 283, 293; Federalist, Nos. 44, 64; Debates on the British Treaty of 1794; Journal of the H. of Reps., 6th April, 1796; Marshall's Life of Washington, ch. 8, pp. 650-659. Sergt's Const. 3d edition, ch. 34, p. 410; 1 Debates on British Treaty, by Bache (1796), pp. 374-386; 4 Elliot's Debates, 244-248. A treaty is to be regarded by courts of justice as equivalent to an act of the legislature whenever it operates itself without the aid of any legislative provision. *Foster v. Neilson*, 2 Pet. 314.

What was Jefferson's opinion? See Jefferson's Opinion in Washington's Cabinet, that a treaty was a law of a superior order (Greek Treaty of 1790), and could not be repealed by a future one; and see a different view, 4 Jefferson's Corresp. 497, 498; Wheaton's Life of Pinckney, p. 517.

139, 154-161, 203, 210, 211, 218, 219, 226, 228. **241.** The Constitution or laws of any State to the contrary notwithstanding. It matters not whether the action of a State is organic, and in its Constitution, or any ordinance; or whether it be in a statute, if it violate the Constitution, laws, or treaty of the United States, it is simply void, and "the judges of every State" are bound by the supreme law, and not by the State law. *Marbury v. Madison*, 1 Cr. 137, 176; *Calder v. Bull*, 3 Dall. 386; *Satterlee v. Mathewson*, 2 Pet. 380, 413; *Ex parte Garland*, 4 Wall. 399; *Cummings v. Missouri*, 5 Wall. 277, 329.

142, 143.

239. All courts will declare State Constitutions and laws, which clearly violate the Constitution, laws, or treaties of the United States, void. But only in clear cases. *Id.* See particularly *Ableman v. Booth*, 21 How. 507-526.

Who shall be bound by the oath of office? 19, 35, 46, 174, 182. [3.] The senators and representatives before mentioned, and the members of the several State legislatures, and all executive and judicial officers, both of the United States and of the several States, shall be bound, by oath or affirmation, to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

What officers are embraced? 229-231, 241-242, 274-285. **242.** "THE SENATORS," &c.—The classification embraces all the legislative, executive, and judicial officers of the United States, and of the States. The practice has also been to embrace all the ministerial and militia officers of the country. The object doubtless was to procure solemn recognitions of the preceding clause. Story's Const. § 1844-1846. Especial attention is invited to the fourteenth amendment. The disqualification for participation in rebellion seems to be based upon the higher obligation to observe this oath.

What was the oath? The act of 1st June, 1789, prescribed the following oath:—
"I, A. B., do solemnly swear, or affirm (as the case may be), that I will support the Constitution of the United States." 1 Stat. 23; 1 Brightly's Dig. 706.

No other oath is required, "yet he would be charged with insanity who would contend that the legislature might not superadd to the oath directed by the Constitution such other oath of office as its wisdom might suggest." (McCulloch v. Maryland, 4 Wheat. 416.) The United States v. Rhodes (by Justice Swayne, in Kentucky, October T. 1867). 480.

This is the last and closing clause of the Constitution, and inserted when the whole framework of the government had been adopted by the convention. It binds the citizens and the States. And certainly no faith could be more deliberately and solemnly pledged than that which every State has pledged to the other States to support the Constitution as it is, in all its provisions, until they shall be altered in the manner which the Constitution itself prescribes. In the emphatic language of the pledge required, it is to support this Constitution. 174, 182

The act of Congress of 2d July, 1862, 12 Stat. 502, § 1, requires all federal officers to take the following oath:—"I, A. B., do solemnly swear (or affirm), that I have never voluntarily borne arms against the United States since I have been a citizen thereof; that I have voluntarily given no aid, countenance, counsel, or encouragement to persons engaged in armed hostility thereto; that I have neither sought nor accepted, nor attempted to exercise the functions of any office whatever, under any authority or pretended authority in hostility to the United States; that I have not yielded a voluntary support to any pretended government, authority, power, or Constitution within the United States, hostile or inimical thereto. And I do further swear (or affirm) that, to the best of my knowledge and ability, I will support and defend the Constitution of the United States, against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion, and that I will well and faithfully discharge the duties of the office on which I am about to enter, so help me God." 236.

The oath may be taken before any State officer authorized to administer oaths. If it be falsely taken, or if it be subsequently violated, it is perjury. The oath is required of all attorneys practicing in the federal courts, and before any of the departments of government, and of all captains of vessels. 2 Brightly's Dig. p. 348 and p. 50; 12 St. 610. It was held by Judge Busteed, of the United States District Court of Alabama, that, as to lawyers, this test oath was unconstitutional. 142, 143.

The statute has been held to be unconstitutional as to attorneys of the Supreme Court of the United States who were such before the rebellion, and who could not take the oath because of their participation in it. Garland's Case, 4 Wall. 381. How far unconstitutional?

"No RELIGIOUS TEST" was doubtless used in the sense of the statute of 25 Charles II., which required an oath and declaration against transubstantiation, which all officers, civil and military, were formerly obliged to take within six months after their admission. See Webster's Dic., TEST. The object was to cut off all pretense of alliance between Church and State. Story's Const. § 184. What is a religious oath? 245. 235. 481.

754; 4 Black. Com. 44, 53-57; 2 Kent's Com. Lect. 24, 34, 35; Rawle's Const. ch. 10, p. 121.

ARTICLE VII.

By how
many States
to be rati-
fied?

The ratification of the conventions of nine States shall be sufficient for the establishment of this Constitution between the States so ratifying the same.

Done in Convention, by the unanimous consent of the States present, the seventeenth day of September, in the year of our Lord one thousand seven hundred and eighty-seven, and of the independence of the United States of America the twelfth. In witness whereof, we have hereunto subscribed our names.

GEORGE WASHINGTON, *Presid't,*

And deputy from Virginia.

New Hampshire.

JOHN LANGDON,
NICHOLAS GILMAN.

Massachusetts.

NATHANIEL GORHAM,
RUFUS KING.

New Jersey.

WIL: LIVINGSTON,
DAVID BREARLY,
WM. PATERSON,
JONA: DAYTON.

Pennsylvania.

B. FRANKLIN,
THOMAS MIFFLIN,
ROBERT MORRIS,
GEO: CLYMER,
THO: FITZSIMONS,
JARED INGERSOLL,
JAMES WILSON,
GOUV: MORRIS.

Delaware.

GEO: READ,
GUNNING BEDFORD, JUN'R,
JOHN DICKINSON,
RICHARD BASSETT,
JACO: BROOM.

Connecticut.

WM. SAML. JOHNSON,
ROGER SHERMAN.

New York.

ALEXANDER HAMILTON

Maryland.

JAMES M'HENRY,
DAN: OF ST. THOS. JENIFER,
DANL. CARROLL.

Virginia.

JOHN BLAIR,
JAMES MADISON, JR.

North Carolina.

WM. BLOUNT,
RICH'D DOBBS SPAIGHT,
HU. WILLIAMSON.

South Carolina.

JOHN RUTLEDGE,
CHARLES COTESWORTH PINCKNEY,
CHARLES PINCKNEY,
PIERCE BUTLER.

Georgia.

WILLIAM FEW,
ABRAHAM BALDWIN.

Attest: WILLIAM JACKSON, *Secretary.*

243. "RATIFICATION" [*Ratificare*; from *ratus*, valid, and *facere*, Define to make. Litt. Sec. 515. Equivalent to "*confirmare*."]—Co. Litt. ratification? 295*b*. A confirmation of a previous act done either by the party 46. himself or by another. (Story on Agency, § 250, 251; 2 Kent's Com. 237.) Burrill's Law Dic., RATIFICATION.

"OF THE CONVENTIONS OF NINE STATES."—This was intended to leave the action to the people, as the legislatures could only make a league or treaty between the parties. Federalist, No. 43. See Story's Const. § 1850–1856, and 621.

"BETWEEN THE STATES RATIFYING THE SAME."—"States" is here used in the sense of independent governments, which could not act, however, through their legislatures; but only through the conventions of the people. But *when*, is not declared. That the rejection by a convention was no estoppel upon a State, is proved by the case of North Carolina, whose first convention rejected the Constitution. The condition of the non-ratifying States is not defined; but the principles of self-preservation were strongly set forth at that day. Federalist, 43; No. 2 Kent's Com. Lect. 24, 30–36; Rawle's Const. ch. 10, p. 121; Story's Const. § 1851, 1852. In what sense is "States", here used? 6.

"ESTABLISHMENT," is here used in the same sense as the verb in the preamble: the putting the government created by the Constitution into operation. 1–13, 248.

Ratifying extends beyond a literal definition of the term. For although the "new States," and the independent nation (Texas) which have since been admitted into the Union, cannot be said to have *ratified* the Constitution in the sense of agreeing to the act done by themselves or another for them; yet in theory and in practice, they have agreed to all its obligations; and because of this agreement, every citizen for himself, and each State in its sovereign or corporate capacity, is bound by all the obligations which the Constitution and the amendments impose. See the able opinions in *Chisholm v. Georgia*, 2 Dall. 474. See Preface, p. v. To what does ratifying extend? 229–232. 205, 271.

Thus we see that from the first word in the preamble to the end of this stupendous work, there is a constant recurring necessity to carefully weigh every word and phrase; to arrive at the definitions by consulting the whole context, and interpreting each part by the ordinary rules of interpreting other great laws and compacts among men; that is by the words of the instrument, its context, its reason and spirit, the old law, the mischiefs and the remedies intended to be applied; always bearing in mind the great principle, that the compact must strengthen rather than perish. 6.

The Constitution was adopted on the 17th September, 1787, by the convention appointed in pursuance of the resolution of the Congress of the Confederation, of the 21st February, 1787, and was ratified by the conventions of the several States, as follows, viz.:—Of Delaware, on the 7th December, 1787; Pennsylvania, 12th Dec., 1787; New Jersey, 18th Dec., 1787; Georgia, 2d Jan., 1788; Connecticut, 9th Jan., 1788; Massachusetts, 6th Feb., 1788; Maryland, 28th April, 1788; South Carolina, 23d May, 1788; New Hampshire, 21st June, 1788; Virginia, 26th June, 1788; New York, 26th July, 1788; North Carolina, 21st Nov. 1789; Rhode Island, 29th May, 1790. North Carolina rejected it at its first convention. Story's Const. § 1851. When was the Constitution ratified by the States? 229, 230.

When were the amendments proposed?

244. AMENDMENTS TO THE CONSTITUTION.—These thirteen articles proposed by Congress, in addition to, and amendment of the Constitution of the United States, having been ratified by the legislatures of the requisite number of the States, have become parts of the Constitution. The first ten amendments were proposed by Congress at its first session, in 1789. The eleventh was proposed in 1794, the twelfth in 1803, and the thirteenth and fourteenth (in note 275), as explained in notes 274, 275–285. Brightly's Dig. p. 12, note (a).

For the reasons which led to these amendments, see 2 Elliot's Debates, 331, 380–427; 1 Id. 119–122; 3 Id. 139, 140, 149, 153; Story's Const. § 1857–1868; 2 American Museum, 423, 425; Id. 534; Id. 540–546; Id. 553; 2 Kent's Com. Lect. 24; Federalist, No. 84; 1 Lloyd's Debates, 414, 420, 430–447. And see the History of the Rebellion for the 13th and 14th.

What was the object of the amendments?

The whole object seems to have been to limit the powers of the government by the prohibitory power of a bill of rights, notwithstanding the government was one of limited powers, and contained many restrictions in the shape of a bill of rights. Story's Const. § 1857–1862.

ARTICLE I.

What restrictions as to religion, speech, the press, and right of petition?

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Define "establishment"? 93, 104, 243.

245. "ESTABLISHMENT."—Here it means a system of religion recognized and supported by the State; as the Establishment or Established Church of England. Worcester's Dictionary, ESTABLISHMENT; Story's Const. § 1871.

What is religion? 481.

"OF RELIGION."—[Lat. *Religio*, from *re* and *ligo* to bind.]—An acknowledgment of our obligation to God as our creator, with a feeling of reverence and love, and consequent duty of obedience to him, &c. Here a particular system of faith or worship. Worcester's Dic., RELIGION. Webster, Id. for a more comprehensive definition.

What was the object?

The real object of the amendment was, not to countenance, much less to advance Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment which would give to a hierarchy the exclusive patronage of the national government. Story's Const. § 1877; 2 Lloyd's Debates, 195–197. For a discussion of the subject, see 2 Kent's Com. (11 ed.) Lect. 24, pp. 35–37; notes 1, a, b, c, d. Rawle's Const. ch. 10, pp. 121, 122; Montesq. Spirit of Laws, B. 24, ch. 3, 5; 1 Tuck. Black. Com. App. 296; 2 Id. note G, pp. 10, 11; 4 Black. Com. 41–59; Lord King's Life of Locke, 373; Jefferson's Notes on Vir-

ginia, 264-270; Story's Const. § 1870-1879; People v. Ruggles, Object. 8 Johns. 160; Vidal v. Girard's Executors, 2 How. 127.

This, and the clause in the Vith Article, that "no religious test shall ever be required for office," are the only provisions in the federal Constitution upon the subject. *Ex parte* Garland, 4 Wallace, 397.

No restraint is placed on the action of the States; but the whole power over the subject of religion is left exclusively to the State governments. (Story's Const. § 1878.) *Ex parte* Garland, Id. Is the restraint upon the action of the States? 243-245.

This makes no provision for protecting the citizens of the respective States in their religious liberties; that is left to the State constitutions; nor is there any inhibition imposed by the Constitution of the United States in this respect on the States. (Permoli v. First Municipality, 3 How. 589, 609; *Ex parte* Garland, 4 Wall. 399.

This court now holds the provision in the Constitution of Missouri void, on the ground that the federal Constitution forbids it. (Such as a test oath to priests.) *Ex parte* Garland, 4 Wallace, 398. 17. 142, 143. See the subject fully discussed in 1 Kent's Com. 11th edition, Part IV. sec. XXIV. p. 633; Story's Const. § 1870-1879; Andrew v. The Bible, &c., Society, 4 Sandf. N. Y. 156; Ayers v. M. E. Church, 3 Id. 351.

Christianity is not a part of the municipal law. Andrew v. N. Y. & P. B. Society, 4 Sandf. N. Y. R. 182. With us, all religions are tolerated, and none is established; each has an equal right to the protection of the law. Ayers v. The Methodist Church, 3 Sandf. 377. It must be understood to extend equally to all sects, whether they believed in Christianity or not, and whether they were Jews or Infidels. (Updegraff v. The Commonwealth, 11 Sergt. & Rawle, 394.) Is Christianity a part of the common law? What is the extent of our toleration? Vidal v. Girard's Executors, 2 How. 198.

This declaration (to the same effect in the Constitution of the republic of Texas) reduced the Roman Catholic Church from the high privilege of being the only national church, to a level and an equality with every other denomination of Christians. Blair v. Odin, 3 Tex. 300; Wheeler v. Moody, 9 Tex. 376. After this fundamental change, assessments and contributions could not be levied for the purpose of creating such edifices and supporting ecclesiastics, on the ground that the previous system had destined such contributions. (Antoinet v. Esclava, 9 Porter, 527; Terrett v. Taylor, 9 Cr. 43.) Paschal's Annotated Digest, note 154; Blair v. Odin, 3 Tex. 300. What is the revolutionary effect of such declarations?

So far as they (the acts of Congress organizing the territories) conferred political rights, and secured civil and religious liberties (which are political rights), the laws of Congress were all superseded by the State Constitution; nor are any part of them in force, unless they were adopted by the Constitution of Louisiana, as laws of the State. Permoli v. First Municipality, 3 How. 610. 229, 231.

246. "FREEDOM OF SPEECH" [from *freo*, free, and *dom*, jurisdiction].—Liberty; exemption from servitude. Syn. Freedom and liberty, as applied to nations, are often used synonymously. What is freedom? 482. *Freedom* is personal and private; *liberty* public. Worcester's Dic., FREEDOM.

Define
"freedom of
the press"?

483.

247. "AND OF THE PRESS."—This language imports no more than that every man shall have a right to speak, write, and publish his opinions upon any subject whatsoever, without any prior restraint, so, always, that he does not injure any person in his rights, person, or reputation; and so always that he does not thereby disturb nor attempt to subvert the government. (Rawle's Const. ch. 10, pp. 123, 124; 2 Kent's Com. Lect. 24, pp. 16-26; De Lolme, B. 2, ch. 12, 13; 2 Lloyd's Debates, 197, 198.) Story's Const. § 1880-1885; Paschal's Annotated Digest, note 161, p. 47; 1 Black. Com. 152, 153; Rex v. Burdett, 4 Barn & Ald. 95; De Lolme, B. 2, ch. 12, 291-297.

6, 16, 251.

248. "THE PEOPLE" here is used in the broad sense of the preamble; and a broader sense than "electors." It was never understood to apply to slaves.

Define the
"right to
petition"?

"RIGHT TO PETITION."—This right is incident to a republican government. Story's Const. § 1994, 1995. The only question is as to the "GRIEVANCES" to be redressed. That must always be determined by the power of the "government" to give the redress asked. See the discussions on the 21st rule of the House of Representatives in 1838, and the debates thereon until 1846.

It is to be observed that the right is to petition the "GOVERNMENT." This must mean to address the petition to the appropriate department: to Congress, the executive, or the judiciary, according to their respective jurisdictions, as prescribed by the Constitution and laws. The questions of jurisdiction and of right must always determine whether the redress sought can be granted.

ARTICLE II.

What is the
right to
bear
arms?

A well-regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed.

249, 130, 175,
238, 240.

484.

249. This clause has reference to a free government, and is based on the idea, that the people cannot be oppressed or enslaved, who are not first disarmed. Cockrum v. The State, 24 Tex. 401.

See Tucker's Black. Com. upon the Militia, App. 300; Black. Com. 143, 144; Rawle's Const. ch. 10, pp. 126, 127; 2 Lloyd's Debates, 23.

The President, by order, disbanded the volunteer companies of the District of Columbia, in November, 1867. His right to do so has been denied.

ARTICLE III.

No soldier shall, in time of peace, be quartered in any house without the consent of the owner; nor in time of war, but in a manner to be prescribed by law.

What is a
soldier?

250. "NO SOLDIER."—SOLDIER, a man engaged in military service; one whose occupation is military; a man enlisted for

service in an army; a private or one in the ranks. Webster's Definition. Dic., SOLDIER.

"SHALL BE QUARTERED IN ANY HOUSE."—TO QUARTER is to station soldiers for lodging. Webster's Dic., QUARTER.

The object is to secure the perfect enjoyment of that great right of the common law, that a man's house shall be his own castle, privileged against all civil and military intrusion. Story's Const. § 1900.

"THE OWNER" here means the occupant in possession.

ARTICLE IV.

The right of the people to be secure in their persons, Warrants? houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

251. "THE PEOPLE" is here used in as comprehensive a sense Who are the as in the preamble, and perhaps in a more enlarged sense than people? there or elsewhere. It embraces all the inhabitants—citizens and aliens—who are entitled to the protection of the law. The slaves 6, 16, 93, 220, were never treated as a part of this "people." The provision 221, 243, 253. is indispensable to the full enjoyment of the rights of personal security, personal liberty, and private property. Story's Const. § 1902.

"SEARCHES AND SEIZURES," are always unreasonable when they When un- are without authority of law. It was intended to prevent domi- reasonable? ciliary visits and arbitrary arrests, which are the natural fruits of unrestricted power.

252. "AND NO WARRANT," &c.—[O. Fr. *quarent*; Lomb. *warens*.] What is a —An authority to do some judicial act; a power derived from warrant? a court, to take some person or property. Burrill's Law Dic., WARRANT.

This refers only to process issued under authority of the United To what States. *Smith v. Maryland*, 18 How. 71. And it has no applica- confined? tion to proceedings for the recovery of debts. as a treasury distress 257. warrant. *Murray's Lessee v. Hoboken Land & Improvement Co.* Id. 272. See *Ex parte Burford*, 3 Cr. 448; *Wakely v. Hart*, 6 Binn. 316; 1 Opin. 229; 2 Id. 266. See *Ex parte Milligan*, 4 Wall. 119. It was caused by the practice of issuing general warrants. Story's Const. § 1902. See *Moody v. Beach*, 3 Barr. 1743; 4 Black. Com. 291, 292; 15 *Hansard's Parliamentary History*, 1398–1419 (1764); *Bell v. Clapp*, 10 Johns. 263; *Sailley v. Smith*, 11 Johns. 500; Report and Resolutions of the Virginia Legislature, 25th Feb. 1799; 4 *Jefferson's Correspondence*, justifying arrests by *Wilkinson*, 75–136; Story's Const. § 1902, note 2.

ARTICLE V.

What is necessary to charge a capital or infamous crime?

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled, in any criminal case, to be witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

What of the rights of property?
435-489.

What is a "person"?
19, 35, 159.

253. PERSON.—Practically the slaves and people of color were never considered as embraced in this amendment, as they were often proceeded against without indictment. It meant a free white.

What is a capital or infamous crime?
40, 99, 110-116, 142, 191-194.

"CAPITAL OR OTHERWISE INFAMOUS CRIME."—This must mean treason, piracy, or felony ("high crime"), as contradistinguished from "misdemeanor." Story's Const. § 1784.

In England, it formerly incapacitated the party committing it from giving evidence as a witness; such as treason, *præmunire*, felony, and every species of *crimen falsi*, as perjury, forgery, and the like. Roscoe's Criminal Evidence, 135. Usually, in this country, it means such as are punished with death, or imprisonment in a State prison or penitentiary. Id.

What is a presentment?
252, 260.

But the "PRESENTMENT OR INDICTMENT" is used in all offenses against the United States. "*Presentment*" is the notice taken by a grand jury of any offense, from their own knowledge or observation, without any bill of indictment laid before them, upon which the officer of the court must afterward frame an indictment, before the party presented can be put to answer for it. 4 Black. Com. 301.

Presentment (information) is not synonymous with "indictment." An indictment must be found by a grand jury; an information may be preferred by an officer of court. Clepper v. The State, 4 Tex. 244; Paschal's Annotated Digest, notes 162, 163, p. 48. It has never yet been authorized by act of Congress. Story's Const. § 1785.

What is an indictment?
252, 260.

An "INDICTMENT" is a written accusation of one or more persons of a crime or misdemeanor, preferred to and presented on oath by a grand jury. (4 Bl. Com. 302; 4 Stephens' Com. 69; Arch. Cr. Pl. 1.) Burrill's Law Dic., INDICTMENT. See Paschal's Annotated Digest, Art. 2863, notes 720-721.

What is a grand jury?

A "GRAND JURY" is a body of men varying from not less than twelve to not more than twenty-three, who, in secret, hear the evidence offered by the government only, and find or ignore bills of in-

dictment presented to them. (4 Bl. Com. 302, 303; 4 Stephens Com. 369, 370.) Burrill's Law Dic., GRAND JURY; Story's Const. § 1784; The King v. Marsh, 6 Adolph. & Ell., 236; 1 Nev. & Perry, 187; People v. King, 2 Caines' Cases, 98; Commonwealth v. Wood, 2 Cush. 149. The subject of grand juries is regulated by Act of Congress. 9 St. 72; 4 St. 188; 1 Brightly's Dig. 223, 232.

260.

254. "EXCEPT IN CASES ARISING IN THE LAND OR NAVAL FORCES, OR THE MILITIA WHEN IN ACTUAL SERVICE IN TIME OF WAR OR PUBLIC DANGER."—This article, compared with the eighth section of the first article, "to provide and maintain a navy;" "to make rules for the government of the land and naval forces." Under these provisions Congress has the power to provide for the trial and punishment of military and naval offenses in the manner then and now practiced by civilized nations; and the power to do so is given without any connection between it and the third article of the Constitution defining the judicial power of the United States. Indeed, the two powers are entirely independent of each other. *Dynes v. Hoover*, 20 How. 78.

What is the exception?
117, 130.

127-129, 260.

What is the jurisdiction in a military trial?

And if the sentence be confirmed, it becomes final, and must be executed, unless the President pardon the offenders. When confirmed, it is beyond the jurisdiction of any civil tribunal whatever, unless it should be in a case where the court had not jurisdiction over the subject-matter of the charge. *Dynes v. Hoover*, 20 How. 81; 3 Whiting, 335.

If the court-martial had no jurisdiction, or should inflict a punishment forbidden by the law, although the sentence be approved, civil courts may, on an action by a party aggrieved, inquire into the want of jurisdiction and give redress. (*Harman v. Tuppen*, 1 East, 555; *Marshall's Case*, 10 Cr. 76; *Morrison v. Sloper*, Willes, 30; *Parton v. Williams*, B. & A. 330.) *Dynes v. Hoover*, 20 How. 82; S. C. 3 Whiting, 336.

Suppose the court-martial has no jurisdiction?

255. "FOR THE SAME OFFENSE TO BE PUT TWICE IN JEOPARDY OF LIFE OR LIMB."—The meaning of this phrase is, that a party shall not be tried a second time for the same offense, after he has once been acquitted or convicted, unless the judgment has been arrested or a new trial granted on motion of the party. But it does not relate to a mis-trial. (*United States v. Haskell*, 4 Wash. C. C. 402, 410.) *United States v. Perez*, 9 Wheat, 579. The court may discharge a jury from giving a verdict, in a capital case, without the consent of the prisoner, whenever, in their opinion, there is a manifest necessity for such an act, or the ends of justice would be otherwise defeated. *United States v. Perez*, 9 Wh. 579. See *United States v. Haskell*, 4 Wash. C. C. 402; *United States v. Gilbert*, 2 Sumn. 19; Story's Const. § 1787. See the cases fully collected and the distinctions nicely stated in 2 *Graham & Waterman on New Trials*, ch. 2, pp. 51-135. *Paschal's Annotated Digest*, note 113.

What means twice in jeopardy?
260.

486.

256. "WITNESS AGAINST HIMSELF."—To make a man a witness against himself would be contrary to the principles of a republican government. *Wynehamer v. The People*, 13 N. Y. 391, 392.

Why not a witness against himself?

Is the inhibition confined to criminal cases?

238.

This must have reference to criminal proceedings, since the practice of discovery in civil cases is universal. See 4 Bl. Com. 326; 3 Wilson's Law Lect. 154-159; Cicero pro Sulla, 28. Rutherford's Inst. B. 1, ch. 18, § 5. Such a practice in criminal cases is conceived in a spirit of torture. Story's Const. § 1788.

What is due process of law?

260.

487, 488.

Repeat Magna Charta?

251.

257. "WITHOUT DUE PROCESS OF LAW."—By the "due course of law," is meant all the guaranties set forth in the sixth amendment. Jones v. Montes, 15 Tex. 353; Jones v. Reynolds, 2 Tex. 251. In *Magna Charta* it probably meant the established law of the kingdom, in opposition to the Civil or Roman law. James v. Reynolds, 2 Tex. 251; Paschal's Annotated Digest, note 155.

Nec super eum ibimus, nec super eum mittimus, nisi per legale iudicium parium suorum, vel per legem terræ. Neither will we pass upon him, or condemn him, but by the lawful judgment of his peers or the law of the land. Magna Charta; Story's Const. § 1789. See the question examined. Murray's Lessee v. Hoboken Land & Improvement Company, 18 How. 272.

It conveys the same meaning as "law of the land," in *Magna Charta*. (2 Inst. 50.) Id. 276.

What is due course of law?

260.

"DUE PROCESS OF LAW."—This means that the right of the citizen to his property, as well as life or liberty, could be taken away only upon an open, public, and fair trial before a judicial tribunal, according to the forms prescribed by the laws of the land for the investigation of such subjects. 9th Op. 200. An executive officer cannot make an order to violate this principle. Id. Property and life are put upon the same footing. Id.

Define the right of a citizen?

253.

The true interpretation of these constitutional phrases is, that where rights are acquired by the citizen under the existing law, there is no power in any branch of the government to take them away; but where they are held contrary to existing law, or are forfeited by its violation, then they may be taken from him—not by an act of the legislature, but in the due administration of the law itself, before the judicial tribunals of the State. Wynehamer v. People, 13 N. Y. R. 393; Taylor v. Porter, 4 Hill, 145. That is by indictment or presentment of good and lawful men. (2 Kent's Com. 13; Story's Const. § 1782; 2 Coke's Inst. 45-50.) Wynehamer v. People, 13 N. Y. R. 395; Jones v. Montes, 15 Tex. 352; Paschal's Annotated Digest, note 155; 2 Inst. 50, 51; 2 Kent's Com. Lect. 24, p. 10; Story's Const. § 1789.

What is law?

239.

What law? Undoubtedly a pre-existing rule of conduct, not an *ex post facto* law, rescript, or decree made for the occasion—the purpose of working the wrong. (Norman v. Heist, 5 Watts & Sergt. 193; Taylor v. Porter, 4 Hill, 145; Hoke v. Henderson, 4 Dev. 15.) Wynehamer v. People, 13 N. Y. R. 393, 394. See full citations, 2 Kent's Com. 11th ed. 339, 240, and notes.

Does the rule apply to the collection of revenue?

This is intended to secure the citizen the right to a trial, according to the forms of law. Parsons v. Russel, 11 Mich. 113. But it does not apply to proceedings to collect the public revenue. Ames v. Port Huron, &c., Co. 11 Mich. 139. See that question exhaustively investigated. Taylor's Lessee v. Hoboken Land & Improvement Company, 18 How. 272.

For though "due process of law" generally implies and includes

actor, reus, judex, regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceeding, yet this is not universally true. (2 Inst. 47, 50; Hoke v. Henderson, 4 Dev. N. C. R. 15; Taylor v. Porter, 4 Hill, 146; Van Zandt v. Waddel, 2 Yerg. 260; State Bank v. Cooper; Id. 599; Jones v. Heirs of Perry, 10 Id. 59; Greene v. Briggs, 1 Curtis, 311.) Murray v. Hoboken L. & I. Co., 18 How. 280. 488.

The article is a restraint on the legislative as well as on the executive and judicial branches of the government, and cannot be so construed as to leave Congress free to make any process "due process of law." Id. 276. We must examine the Constitution itself, to see whether the process be in conflict with any of its provisions. Id. 277. Summary process to collect revenue was always allowed. Id. Authorities exhausted. Id. Does the article restrain the legislature?

The law of New York, which authorizes a person to be committed as an inebriate to the lunatic asylum upon an *ex parte* affidavit, without being heard, violates this guaranty. In matter of Jones, 30 How. Pr. 446. Exemplify a violation of this clause?

258. "PRIVATE PROPERTY FOR PUBLIC USE WITHOUT JUST COMPENSATION.—"PRIVATE PROPERTY" is the sacred right of individual dominion. It is one of the great absolute rights of every citizen to have his property protected. And the government has no right to deprive the citizen of his property, except for the use of the public; nor then, without compensation. Story's Const. § 1790. What is private property? 231, 233, 144, 72.

This phrase includes all private property. United States v. Harding, 1 Wall. Jr. 127; 2 Opin. 655. See Murray's Lessee v. Hoboken Land & Improvement Company, 18 How. 276. This last clause refers solely to the exercise by the State of the right of eminent domain. (The People v. The Mayor of Brooklyn, 4 Comst. 419.) Gilman v. The City of Sheboygan, 2 Blackf. 513. This provision is only a limitation of the power of the general government; it has no application to the legislation of the several States. Barron v. Mayor of Baltimore, 7 Pet. 243-7; Bonaparte v. Camden & Amboy R. R. Co., Bald. 220. It is now settled that the amendments to the Constitution do not extend to the States. Livingston's Lessee v. Moore, 7 Pet. 551; Boring v. Williams, 17 Ala. 516. They are exclusively restrictions upon federal power, intended to prevent interference with the rights of the States, and of their citizens. Fox v. Ohio, 5 How. 434; James v. Commonwealth, 12 S. & R. 221; Barker v. The People, 3 Cow. 686. It is a great principle of the common law, which existed anterior to the Constitution and to *magna charta*, and which was embodied in the 29th article of that great charter:—"No freeman shall be taken, or imprisoned, or disseized of his freehold, or liberties, or otherwise destroyed, but by lawful judgment of his peers, or by the law of the land." Young v. McKenzie, 3 Ga. 42. This is an affirmation of a great doctrine established by the *common law* for the protection of private property. It is founded on natural equity, and laid down by jurists as a principle of universal law. (Story's Const. § 1790; Bradshaw v. Rogers, 2 Johns. 106; Louisville, Cincinnati & Charleston Railroad Co. v. Chappell, Rice, 387; Doe v. The 489. What says Magna Charta?

Authorities. Georgia R. R. & B. Co., 1 Kelley, 524; 1 Bl. Com. 139, 140.) Young v. McKenzie, 3 Ga. 40-44; 2 Kent's Com. Lect. 24, pp. 275, 276; 3 Wilson's Law Lect. 203; Ware v. Hylton, 3 Dall. 194, 235. In the absence of any such declaration in the Constitution of Georgia, we refer to this amendment as a plain, simple declaration of a great constitutional principle, of universal application, as asserted and declared in the Constitution of the United States. Young v. McKenzie, 3 Ga. 45. The true principle from this case would seem to be, that the Constitution of the United States, and the amendments, enter into and form parts of the State Constitutions—paramount *pro tanto*.—ED. Some of these amendments were *declaratory*; some *restrictive* of the powers of the federal government. The latter clause of this article is only declaratory. Young v. McKenzie, 3 Ga. 44.

A "public use" means a use concerning the whole community, as distinguished from particular individuals, though each and every member of society need not be equally interested in such use. Gilmer v. Line Point, 18 Cal. 229. And see Honeyman v. Blake, 19 Cal. 579. See People v. Kerr, 3 Barb. N. Y. 357. The right of the owners of town lots to the adjoining street, is as much property as the lot itself. Lackland v. North Missouri R. R. Co. 31 Mo. 180.

What is just compensation? **259. "JUST COMPENSATION."**—Although we may hold that "compensation" is not altogether synonymous with "payment," yet the means of payment must not be doubtful. The making of compensation must be as absolutely certain as that the property is taken. (Carr v. Ga. R. R. & B. Co., 1 Kelley, 524; Young v. Harrison, 6 Ga. 130; Bloodgood v. M. & H. R. R. Co., 18 Wend. 9; 2 Kent's Com. 339.) B. B., Brazos & Colorado Railroad Co. v. Ferris, 26 Tex. 602. (See 2 Kent's Com. 3d ed. notes f, and 7; Miller v. Craig, 3 Stockt. N. J. 106.)

In what must be the payment? The payment must be in money, the constitutional currency. Id. The advantages to the land not taken cannot be estimated against the intrinsic value of the land actually taken. (Jacob v. The City of Louisville, 9 Dana, 114; The People v. The Mayor of Brooklyn, 6 Barb. 309; Rogers v. R. R. Co. 3 Maine, 310; State v. Miller, 3 Zab. 383; Hatch v. R. R. 25 Vt. 49; Moale v. Baltimore, 5 Md. 314.) B. B., Brazos & Colo. R. R. Co. v. Ferris, 26 Tex. 603, 604; Paschal's Annotated Dig. note 168.

What provision for payment must be made? Under an act which authorizes a work, but does not provide for compensation for private property, which it will be necessary to take, such property cannot be taken without the owner's consent. Carson v. Coleman, 3 Stockt. N. J. 106. The consequential injury occasioned by the grading of a street, is not a taking of private property for public use within the meaning of the prohibition of the Constitution. Macy v. Indianapolis, 17 Ind. 267.

The question is not judicial, but one of political sovereignty, to be exerted as the legislature directs. Ford v. Chicago, &c., R. R. Co. 14 Wis. 609.

For what purpose cannot a railroad condemn? A railroad company cannot condemn a site for erecting a manufactory of railroad cars. Eldridge v. Smith, 34 Vermont (5 Shaw), 484. Nor dwelling-houses for employees. Id. Otherwise as to

wood and lumber used on the road. *Id.* There must be a condemnation, or an agreement consummated. *Id.*; *Whitman v. Boston, &c.*, 3 Allen (Mass.), 133. The condemnation may be within the liberal construction of the charter. *Fall River, &c., Co. v. Old Colony, &c.*, R. R. Co. 5 Allen (Mass.), 221. And see *Wadhams v. Lackawana, &c.*, R. R. Co., 42 Penn. State R. 303; *Vicksburg, &c., R. R. Co.*, 15 La. Ann. 507.

The actual occupant of vacant public lands is entitled to damages, even where the land is taken under an act of Congress. *California, &c., R. R. Co. v. Gould*, 21 Cal. 254. A statute fixing the minimum of fees for defending criminals is not taking private property for public use. *Samuels v. Dubuque*, 13 Iowa (5 With.), 536. 489.

The law of New York, which forbade the sale of spirituous liquors, "*deprived*" the owners of their property; and violated this guaranty. *Wynehamer v. The People*, 13 N. Y. R. 395, 396, 397. When a law annihilates the value of property, and strips it of its attributes, by which, alone, it is distinguished as property, the owner is deprived of it according to the plainest interpretation, and certainly within the spirit of the constitutional provision intended expressly to shield private rights from the exercise of power. *Wynehamer v. People*, 13 N. Y. R. 398. These views do not interfere with the license laws, which have been held to be constitutional; nor with the laws which merely affect the value of property, or render its destruction necessary as a means of safety. (*Story's Const.* § 1790; *Radcliff's Executors v. The Mayor of Brooklyn*, 4 Comst. 195; 2 Kent, 330; *Russel v. The Mayor, &c., of New York*, 2 Denio, 461.) *Wynehamer v. The People*, 13 N. Y. R. 402; *Mitchell v. Harmony*, 13 How. 115; *The License Cases*, 5 Howard, 504; *Lorocco v. Geary*, 3 Cal. 69; *Am. Print Works v. Lawrence*, 1 Zab. 248. To what title does it extend?

A law prohibiting the indiscriminate traffic in intoxicating liquors, and placing the trade under public regulation to prevent abuse in their sale and use, violates no constitutional restraints. It deprives no one of his liberty or property. *Metropolitan Board of Excise v. Barrie*, 34 N. Y. R. 667. What control has the legislature over the liquor trade?

No one legislature can curtail the power of its successors to make such laws as they may deem proper in matters of police. (*Alger v. Weston*, 14 Johns. 231; *People v. Morris*, 13 Wend. 329; *State v. Holmes*, 38 New Hamp. 225; *Calder v. Kirby*, 5 Gray, 597; *Hun v. The State*, 1 Ohio, 15; *Wynehamer v. The People*, 3 Kern. (13 N. Y. R.) 378; *License Cases*, 5 How. 504; *Butler v. Pennsylvania*, 10 How. 416; *Coates v. The Mayor*, 7 Cow. 587; 2 *Parsons on Cont.* 538; 3 *Id.* 5th ed. 556.) *Metropolitan Board v. Barrie*, 34 N. Y. R. 668. Some of the dicta in *Wynehamer v. The People* have misled. *Id.* Can a legislature control its successors?

ARTICLE VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been What are the rights of defendants in criminal cases? 16, 35, 46.

490, 491. previously ascertained by law, and to be informed of the nature and cause of the accusation ; to be confronted with the witnesses against him ; to have compulsory process for obtaining witnesses in his favor ; and to have the assistance of counsel for his defense.

253, 263. **260.** "THE ACCUSED," here means the "person" presented or indicted. The "him" does not limit the accused to sex. Because the amendments did not apply to the States, the slaves and free persons of color were often deprived of a trial by jury.

12, 212, 245.

263.

This is only to be intended of those crimes which, by our former laws and customs, had been tried by jury. *United States v. Duane*, (Penn.) Wall. 106. The conspirators who assassinated the President of the United States, while the country was in a state of war, and while the city of Washington was under martial law, were triable by military commission under the act of Congress, and not entitled to a trial by jury. The Trial of the Conspirators. Any person charged with a crime in the courts of the United States, has a right, before as well as after indictment, to the process of the court to compel the attendance of his witnesses. 1 Burr's Trial, 179-80.

212, 251-259. This section compared with Art. III., Sec. II., clause 3, and the third, fourth, and fifth amendments. *Ex parte Milligan*, 4 Wallace, 119, 120, 139. The history of these guaranties. Id.

What is the Constitution of the United States ? 2, 8, 117.

What is the power of a military commission ?

To whom is jury trial secured ?

254.
253, 254.

What are the exceptions ? 254.

How are the citizens to be tried ? What of martial law ?

140, 141.

The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times and under all circumstances. *Ex parte Milligan*, 4 Wallace, 120, 121. But see the war power discussed. Id. 138, 139. A military commission could exercise no judicial power over a citizen of Indiana during the rebellion. Id. The laws and usages of war could not be applied to citizens in States which have upheld the authority of the government, and where the courts are open and their process unobstructed. *Ex parte Milligan*, Id. 121. This right of trial by jury is preserved to every one accused of crime, who is not attached to the army or navy, or militia in actual service. Id. See dissentient opinion, p. 139. The fifth amendment recognizes the necessity of an indictment or presentment, before any one can be held to answer for high crimes, with the exception therein stated ; by which it was meant to limit the right of trial by jury, in this sixth amendment, to those persons who were subject to indictment or presentment in the fifth. *Ex parte Milligan*, 4 Wallace, 123. Those connected with military or naval service are amenable to the jurisdiction which Congress has created for their government, and, while thus serving, they surrender their right to be tried by the civil courts. Id. *All other persons*, citizens of States where the courts are open, if charged with crime, are guarantied trial by jury. Id. Civil liberty and martial law (at the will of the commander) cannot endure together ; the antagonism is irreconcilable. Id. Neither Congress nor the President can disturb one of these guaranties of liberty, except the one concerning the writ of *habeas corpus*. Id. But

the suspension of the writ and of investigation does not give the power of trial otherwise than by the course of the common law. Id. 125, 126. Martial law cannot arise from *threatened* invasion. The necessity must be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration. Id. 127. *Then* it may exist, until the restoration of civil authority, but no longer. Id. Why martial law cannot be tolerated. (McConnell v. Hampden, 12 Johns. 257; Smith v. Shaw. Id. 234.) *Ex parte* Milligan, 4 Wallace, 129. The case of Luther v. Borden, 7 Howard, 1, explained. Id. It was not a case arising under the federal Constitution. Id. 129, 130. As the applicant was a citizen of the United States residing in Indiana, he could not be treated as a prisoner of war. Id. 131, 134. Chief-Justice Chase and Justices Wayne, Swayne, and Miller concurred in the judgment of, but disagreed as to the powers of Congress over the subjects of MILITARY LAW, which they divided into the articles of war for the government of the national forces, military government superseding, as far as may be deemed expedient, the local law, and exercised by the military commander under the direction of the President; and MARTIAL LAW PROPER, which is called into action by Congress, or temporarily, when the action of Congress cannot be invoked, and in the case of justifying or excusing peril, by the President, in times of insurrection or invasion, or of civil or foreign war, within districts or localities where ordinary law no longer adequately secures public safety and private rights.

What is the effect of suspending the *habeas corpus*?

257.

What justifies martial law?

233.

Can a citizen be treated as a prisoner of war?

What is the military law and how divided?

118, 119.

This was intended as a constitutional safeguard in the trial of those cases for which it was stipulated that the courts shall remain open, and wherein a party shall have his remedy by due course of law. (Beekman v. Saratoga & Schenectady Railroad Company, 3 Paige, 45; Bonaparte v. C. & A. Railway, Bald. C. C. R. 205; Bloodgood v. M. & H. Railway, 14 Wend. 51; S. C. 18 Wend. 9; Stevens v. Middlesex Canal, 12 Mass. 466; Wheelock v. Young, 4 Wend. 650; Stowel v. Flagg, 11 Mass. 364; Mason v. Kennebec & Portland Railroad Company, 31 Maine, 215; Aldrich v. The Cheshire Railroad Company, 1 Foster, N. H. 350.) B. B., Brazos & C. R. R. Co. v. Ferris, 26 Tex. 599; Paschal's Annotated Dig. note 166.

What was the intention of this guaranty?

257.

These decisions are generally made upon similar provisions in the State Constitutions. This provision of the Constitution of the United States applies only to the general government, and not to the States. Withers v. Buckley, 20 How. 84.

"THE ACCUSATION" means a copy of the presentment or indictment. All of these rights have been regulated by acts of Congress. 1 St. 88; 1 Brightly's Dig. 221-224, and exhaustive notes thereon.

253.

261. "COMPULSORY PROCESS," means forcible process, such as attachment. The principle grew out of the oppressive one which denied witnesses to the accused. See 4 Black. Com. 359, 360; Rawle's Const. ch. 10, pp. 128, 129; 3 Wilson's Law Lect. 170, 171; Hawk. P. C. ch. 46, § 160; 2 Hale P. C. 283. Upon affidavit of inability, the accused can have his witnesses at the expense of the United States. 9 St. 72, § 11; 1 Brightly's Dig. 223, § 116.

What is the meaning of "compulsory process"?

Counsel.

262. "ASSISTANCE OF COUNSEL."—When this was adopted the accused were not allowed the assistance of counsel in England. That defect has been cured by an act in 1836. 4 Black. Com. 355, 356, note 9; Story's Const. § 1793-1795.

For the power of the court to assign counsel in cases of treason, see act of 30th April, 1790, 1 St. 117, § 29; 1 Brightly's Dig. 221, § 104.

ARTICLE VII.

✓ Trials in
civil cases?

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact tried by a jury, shall be otherwise re-examined in any court of the United States than according to the rules of the common law.

492,
493.

What are
suits at
common
law?

263. This includes not merely the modes of proceeding known to the common law, but all suits not of equity or admiralty jurisdiction, in which legal rights are settled and determined. *Parsons v. Bedford*, 3 Pet. 433; *United States v. La Vengeance*, 3 Dall. 297; *Webster v. Reid*, 11 How. 437; *Bains v. The Schooner James & Catherine*, Bald. 544; *Smith's Const.* 552, 554; 2 *Graham & Waterman*, 30. It does not apply to an examination as to the claim for services under the fugitive slave law. *Miller v. McQuerry*, 5 McLean, 469; In the matter of *Martin*, 2 Paine, 348. Nor to a motion for summary relief. *Banning v. Taylor*, 12 Harr. 289.

What is the
common
law?

The phrase "COMMON LAW," as used in this section, is used in contradistinction to equity, and admiralty, and maritime jurisprudence. *Parsons v. Bedford*, 3 Pet. 446; *Story's Const.* § 1769; *Smith's Const.* 552. It is reconcilable with the 3d article, and the several acts of Congress about jury trials. *Id.* 446. Neither this article, nor the act of 1824, gives to the Supreme Court the right to revise the verdict of the jury upon the facts. *Id.* 446, 447. The common law, or *lex non scripta*, means those immemorial customs of England, whereof the memory of man runneth not to the contrary. ' Bl. Com. 62.

For whose
benefit is
the trial by
jury?

The right to trial by jury is for the benefit of the parties litigating, and may be waived by them. *United States v. Rathbone*, 2 Paine, 578. But the circuit courts have no power to order a peremptory nonsuit against the will of the plaintiff. *Elmore v. Grymes*, 1 Pet. 469; *D'Wolf v. Rabaud*, *Id.* 476; *Crane v. Lessee of Morris*, 6 *Id.* 593; *Thompson v. Campbell*, *Hemp*. 8. The common law here alluded to, is not the common law of any individual State, but the common law of England; according to which, facts once tried by a jury are never re-examined, unless a new trial be granted, in the discretion of the court before which the suit is depending, for good cause shown; or unless the judgment of such court be reversed by a superior tribunal on a writ of error, and a *venire facias de novo* awarded. *United States v. Wonsou*, 1 Gall. 20. The government is as much bound by this provision as any other party who may desire to collect a debt. 9 Op. 200.

It has been well settled, that the amendments to the Constitution 277-279 of the United States were never intended to control the proceedings of the State courts. (Wood v. Wood, 2 Cowen, 819, *note*; Murphy v. The People, 2 Cowen, 815; Livingston v. Mayor of New York, 8 Wend. 85, 100; Warren v. Mayor of Baltimore, 7 Peters, 250; Livingston v. Moore, 7 Peters, 551; Colt v. Evers, 12 Conn. 243; In the matter of Smith, 10 Wend. Rep. 449; Lea v. Tillotson, 24 Wend. 337.) 2 Graham & Waterman's New Trials, p. 31, *note*. 493.

261. AND NO FACT TRIED BY JURY SHALL BE RE-EXAMINED, &c.—See a discussion on the original Constitution (prior to this amendment), which gave appellate jurisdiction “*both as to law and fact*.” Story’s Const. § 1763-1770, and notes to third edition; Federalist, Nos. 81, 83. And see 1 Elliot’s Debates, 121, 122; 2 Id. 346, 380-410; Id. 413-427; 3 Elliot’s Debates, 139-157; 2 American Museum, 425, 534, 540, 548, 553; 3 Id. 318, 347, 419, 420.

The amendment struck down the objection; and has secured the trial by jury in civil cases in the fullest latitude of the common law. (1 Tucker’s Bl. Com. App. 351; Rawle’s Const. ch. 10, p. 135; Bank of Hamilton v. Dudley, 2 Pet. 492, 525.) Story’s Const. § 1568. 211.

This is a prohibition to the courts of the United States to re-examine any facts tried by a jury, in any other manner. (Parsons v. Bedford, 3 Pet. 447.) Story’s Const. § 1770. It is denied that the judiciary act of 1789, ch. 20, § 17, 22, 24; or the act of 1824, has given the right to the Supreme Court to grant a new trial, on the mere facts. It was intimated that if Congress had attempted to confer such power, the act would be unconstitutional. Id.

265. RE-EXAMINED AFTER VERDICT.—Sec. 5 of the act of 3d March, 1863 (13 St. 756), so far as it authorizes the removal of certain causes after verdict, and a trial and determination of the facts and the law, is in violation of this amendment. (14 Mass. 412.) Patrie v. Murray, 29 How. Pr. R. 312; S. C. 43 Barb. 323; Benjamin v. Murray, 28 How. N. Y. R. 193. And see The People v. Murray, 5 Park. Cr. 577. 264.

And see Spencer v. Lapsley, 20 How. 267; Martin Insurance Co. v. Hodgson, 6 Cr. 206; Sims v. Hundley, 6 How. 1.

ARTICLE VIII.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. What is the rule about bail, fines, and punishments?

266. “EXCESSIVE BAIL.”—BAIL is a delivery from custody on security. Burrill’s Law Dic., BAIL. The meaning is, that the sum required shall not be too large. Bail should not be fixed in criminal cases at a sum so large as purposely to prevent the prisoner from giving bail. United States v. Lawrence, 4 Cr. 518. What is bail?

267. “NOR EXCESSIVE FINES, IMPOSED.”—The offense charged was the keeping and maintaining, without license, a tenement for

Give an example of usual punishment?

the illegal sale and illegal keeping of intoxicating liquors. It appears from the record that the fine and punishment in the case before us was fifty dollars, and imprisonment at hard labor in the house of correction for three months. We perceive nothing excessive, or cruel, or unusual in this. The object of the law was to protect the community against the manifold evils of intemperance. The mode adopted, of prohibiting under penalties the sale and keeping for sale of intoxicating liquors, without license, is the usual mode adopted in many, perhaps all, of the States. It is wholly within the discretion of State legislatures. *Pervear v. The Commonwealth*, 5 Wall. 480. The amendment is an exact transcript of a clause in the English Bill of Rights of 1688. It was intended to warn our government against such violent proceedings. See 5 *Cobbett's Parl. Hist.* 110; 2 *Elliot's Debates*, 345; 3 *Id.* 345; 2 *Lloyd's Debates*, 225, 226; *Rawle's Const.* ch. 10, pp. 130, 131; *Story's Const.* § 1903, 1904.

283.

This amendment does not apply to the States, but only restricts the national government. (*Barker v. The People*, 3 Cow. 686; *James v. Commonwealth*, 12 Sergt. and Rawle, 220; *Barron v. The Mayor of Baltimore*, 7 Pet. 243.) *Story's Const.* § 1904; *Pervear v. The Commonwealth*, 5 Wall. 480.

"CRUEL AND UNUSUAL PUNISHMENTS."—The disfranchisement of a citizen is not an unusual punishment. *Barber v. The People*, 20 Johns. 459. The punishments of whipping and standing in the pillory are abolished by act 28th February, 1839, § 5, Stat. 322. See *James v. Commonwealth*, 12 S. & R. 220.

ARTICLE IX.

What of the reserved rights?

The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people.

What is enumeration?
71, 138.

268. "ENUMERATION."—[Lat. *Enumero*.]—The counting or telling by numbers. Webster's Dic., ENUMERATION.

For what was the amendment intended?

"OF CERTAIN RIGHTS."—This has reference to the several general and special powers granted, surrendered, or delegated to the different departments of the government. It was intended to prevent any perverse or ingenious misapplication of the maxims, that an affirmation in particular cases implied a negation in all others; and, *e converso*, that a negation in particular cases implies an affirmation in all others. (*Federalist*, Nos. 83, 84; No. 83 is reprinted in *Story's Const.* § 1768, 3d ed. pp. 574–582). *Story's Const.* § 1905. See also *Id.* § 448.

Define "deny"?

"DENY."—[Lat. *denego*.]—To contradict; gainsay; disown; reject. Webster's Dic., DENY.

Define "disparage"?

"DISPARAGE"—[Norman, *desperegar*.]—This word is strangely used here. It literally means to dishonor by an unequal match or marriage; to match unequally; to dishonor or injure by comparison with something of less value or excellence; to *undervalue*. Webster's Dic., DISPARAGE.

"RETAINED BY THE PEOPLE."—"PEOPLE" here must be used in the sense of "WE THE PEOPLE" in the preamble, and in the tenth amendment. To illustrate the right of appeal "upon the law and facts," was given to the Supreme Court. It had been objected, that this denied or disparaged the right of trial by jury, as understood at common law. Hence the sixth amendment. Federalist, No. 83. And hence the declaration of the same general principle in this amendment.

ARTICLE X.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people.

269. "THE POWERS" of course mean all those which had been committed to the different departments of the government.

"DELEGATED."—[Lat. *Delego*].—To intrust; to commit; to deliver to another's care and exercise. Webster's Dic., DELEGATE.

The secessionists laid great stress upon the word "delegate," and attached to it the meaning that the States had, in fact, *surrendered* none of their sovereignty; but only created a common agency with certain powers, in trust, which each State, for itself, had the right to resume at pleasure. The "nor prohibited to the States," could have little force with those holding such doctrines. It has been so fashionable to interpolate, "expressly," that many believe the participle "delegated" is so qualified. But such a qualification was moved in Congress and rejected. 2 Lloyd's Debates, 234, 243, 244; McCulloch v. Maryland, 4 Wheat. 404; Martin v. Hunter, 1 Wheat. 325; Houston v. Moore, 5 Wheat. 49; Anderson v. Dunn, 6 Wheat. 225, 226; 2 Article of Confederation, *ante*, p. 9. See Ableman v. Booth, 21 How. 596.

All powers not delegated (not all not *expressly* delegated) and not prohibited are reserved. (McCulloch v. Maryland, 4 Wheat. 406, 407.) Story's Const. § 1903.

See United States v. Bailey, 1 McLean, 234. The same reservation, in substance, was contained in the second article of the Articles of Confederation, except that the word "expressly" was there placed before the word "delegated." Metropolitan Bank v. Van Dyck, 27 N. Y. Rep. 416; McCulloch v. Maryland, 4 Wh. 327. See *ante*, p. 9. This amendment compared with the 9th section of the 1st article. They contain no inhibition upon Congress to legislate upon legal tenders. Metropolitan Bank v. Van Dyck, 27 N. Y. Rep. 418.

ARTICLE XI.

The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United

6, 269, 251,
250.

260-262,
276-277.

How are
the powers
not
delegated
reserved?

What are
the
delegated
powers?
71-138, 162
and every
note.
6.

494, 495.

183, 155.

What is the
limitation
of judicial
power?

Citizens. States, by citizens of another State, or by citizens or subjects of any foreign State.

What caused this amendment? 195, 199, 200, 205*a*, 210, 271. **270.** "THE JUDICIAL POWER," and "ANY SUITS IN LAW OR EQUITY," are to be taken as an amendment of the first section of the third article, so as to take away the jurisdiction of suits against States by individuals. The amendment was caused by the decision in *Chisholm v. Georgia*, 2 *Dallas*, 419, 475; *S. C.* 2 *Cond.* 635; 1 *Kent's Com. Lect.* 14, p. 278; *Cohens v. Virginia*, 6 *Wheat.* 381, 406.

What is now the rule?

This decision held that the original Constitution embraced suits *by* as well as *against* States. *Story's Const.* § 1683. See *Federalist*, Nos. 80, 81; 2 *Elliot's Debates*, 300, 301, 401, 405; *Curtis' Com.* § 61. The suits against the States were principally for money sequestrated or confiscated in the hands of the debtors of the British loyalists. The amendment was held to extend to all pending suits, and they were dismissed. *Hollingsworth v. Virginia*, 3 *Dall.* 378; *Cohens v. Virginia*, 6 *Wheat.* 294; *Georgia v. Brailsford*, 2 *Dall.* 402; *S. C.* 3 *Dall.* 1.

So that now no suit lies by citizen or alien against a State, in the courts of the United States.

In what character must the State sue? 205.

271. "AGAINST ONE OF THE UNITED STATES."—Where the State is sued, and made a party on the record in its political capacity, this amendment applies; and the State may be considered as a party on the record when its chief magistrate is sued, not by his name, but by his style of office, and the claim made upon him is entirely in his official character. (*The Governor of Georgia v. Madrazo*, 1 *Pet.* 110, 123, 124.) *Curtis' Com.* § 67-70.

What suits did the amendment include?

This amendment was construed to include suits then pending, as well as suits to be commenced thereafter; and accordingly, all the suits then pending were dismissed without any further adjudication. (*Hollingsworth v. Virginia*, 3 *Dall.* 378.) *Story's Const.* § 1683. For a history of the amendment, see *Cohens v. Virginia*, 6 *Wheat.* 406.

The amendment only applies to original suits; not to appeals or writs of error for revision. (*Cohens v. Virginia*, 6 *Wheat.* 264.) *Story's Const.* § 1864.

272. "BY CITIZENS OR SUBJECTS OF ANY FOREIGN STATE."—The power of these to sue the State was simply taken away by the amendment.

Does the suit apply to admiralty cases?

It does not extend to suits of admiralty or maritime jurisdiction. *Olmstead's Case*, *Brightly*, 9. See *Ex parte Madrazo*, 1 *Pet.* 127. If the State be not necessarily a defendant, though its interest may be affected by the decision, the courts of the United States are bound to exercise jurisdiction. *Louisville R. R. Co. v. Letson*, 2 *How.* 550; *United States v. Peters*, 5 *Cr.* 115. For the history of this amendment, see *Chisholm v. Georgia*, 2 *Dall.* 471, 475. A State, by becoming interested with others in a banking or trading corporation, or by owning all the capital stock, does not impart to that corporation any of its privileges or prerogatives; it lays down its sovereignty, so far as respects the transactions of the corpora-

tion, and exercises no power or privilege in respect to those transac- **Explained.**
 tions not derived from the charter. *Bank of the United States v. Planter's Bank of Georgia*, 9 Wh. 904; *Bank of Kentucky v. Weston*, 3 Pet. 431; *Briscoe v. Bank of Kentucky*, 11 Id. 324; *Louisville R. R. Co. v. Letson*, 2 How. 497; *Darrington v. Bank of Alabama*, 13 How. 12; *Curran v. Arkansas*, 15 Id. 309. And see *Cohens v. Virginia*, 6 Wh. 264. Where a State sues in its own courts, and obtains a judgment against a citizen, the defendant may prosecute a writ of error in the Supreme Court, and test the constitutionality of a State law. *Craig v. Missouri*, 4 Pet. 410; and the *Arkansas*, *Kentucky*, and *Alabama* cases above cited.

The State is not a party unless it appears on the record as such, 205, 271. either as plaintiff or defendant. It is not sufficient that it may have an interest in the cause, or that the parties before the court are sued for acts done as agents of the State. (*Fowler v. Lindsay*, 3 Dall. 411; *State of New York v. Connecticut*, 3 Dall. 1-6; *United States v. Peters*, 5 Cr. 115-139; 1 *Kent's Com. Lect.* 15, p. 302; *Osborn v. Bank of United States*, 9 Wheat. 846.) *Story's Const.* § 1865, notes 1, 2.

ARTICLE XII.

273. See Art. II., Sec. 3, pp. 164-166, notes 168, 168*a*, 168*b*, for this amendment. It was considered proper by the editor to transfer it to its appropriate place. It does not disturb the arrangement in the original Constitution, nor in the analysis and index. See *ante*, p. 46.

ARTICLE XIII.

1. Neither slavery nor involuntary servitude, except How was slavery abolished? as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the 496-499 United States, or any place subject to their jurisdiction.

2. Congress shall have power to enforce this article The power? by appropriate legislation.

274. The following is the proclamation which declared the 13th When did this article take effect? amendment in force:—

WILLIAM H. SEWARD, Secretary of State of the United States, to all to whom these presents may come, greeting:

Know ye, that whereas the Congress of the United States, on the 1st of February last, passed a resolution which is in the words following, namely:—

"A Resolution submitting to the Legislatures of the several States a proposition to amend the Constitution of the United States.

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of both houses

496. *concurring*), That the following article be proposed to the legislatures of the several States as an amendment to the Constitution of the United States, which, when ratified by three-fourths of said legislatures, shall be valid, to all intents and purposes, as a part of the said Constitution, namely:”—[Here follows the amendment.]

And whereas it appears from official documents on file in this department that the amendment to the Constitution of the United States proposed, as aforesaid, has been ratified by the legislatures of the States of Illinois, Rhode Island, Michigan, Maryland, New York, West Virginia, Maine, Kansas, Massachusetts, Pennsylvania, Virginia, Ohio, Missouri, Nevada, Indiana, Louisiana, Minnesota, Wisconsin, Vermont, Tennessee, Arkansas, Connecticut, New Hampshire, South Carolina, Alabama, North Carolina, and Georgia; in all twenty-seven States:

And whereas the whole number of States in the United States is thirty-six; and whereas the before specially-named States, whose legislatures have ratified the said proposed amendment, constitute three-fourths of the whole number of States in the United States:

Now, therefore, be it known that I, WILLIAM H. SEWARD, Secretary of State of the United States, by virtue and in pursuance of the second section of the act of Congress, approved the twentieth of April, eighteen hundred and eighteen, entitled “An act to provide for the publication of the laws of the United States and for other purposes,” do hereby certify that the amendment aforesaid has become valid, to all intents and purposes, as a part of the Constitution of the United States.

In testimony whereof, I have hereunto set my hand, and caused the seal of the Department of State to be affixed.

Done at the city of Washington, this eighteenth day of December, in the year of our Lord one thousand eight hundred and sixty-five, and of the independence of the United States of America, the ninetyeth.

[L. S.]

WILLIAM H. SEWARD,

Secretary of State.

17, 275.

This proclamation is given to show the views of the executive, that the seceded States had a right to vote upon the amendment, and did in fact, make up the number necessary to put it into operation. The President had previously given notice, that no State would be regarded as restored until it adopted this amendment. Seward's dispatch to the governor of Florida.

List of States which have ratified the amendment to the Constitution prohibiting slavery, &c., and given official notice thereof, with the respective dates of ratification:—

In 1865.—Illinois, Feb. 1; Rhode Island, Feb. 2; Michigan, Feb. 2; Maryland, Feb. 1, 3; New York, Feb. 2, 3; West Virginia, Feb. 3; Maine, Feb. 7; Kansas, Feb. 7; Massachusetts, Feb. 8; Pennsylvania, Feb. 8; Virginia, Feb. 9; Ohio, Feb. 10; Missouri, Feb. 10; Nevada, Feb. 16; Indiana, Feb. 16; Louisiana, Feb. 17; Minnesota, Feb. 8, 23; Wisconsin, March 1; Vermont, March 9; Tennessee, April 5, 7; Arkansas, April 20; Connecticut, May 5,

New Hampshire, July 1; South Carolina, Nov. 13; Alabama, Dec. 2; North Carolina, Dec. 4; Georgia, Dec. 9; Oregon, Dec. 11; California, Dec. 20; Florida, Dec. 28. In 1866.—New Jersey, Jan. 23; Iowa, Jan. 24.

497.

It will thus be seen that the States which have not ratified the amendment are Delaware, Kentucky, Mississippi, and Texas. Delaware alone, of these, gave notice through the governor, of the rejection. Governor Parker of New Jersey, gave notice of rejection on the first of December, 1865; but the same State afterward ratified it.

Because of this amendment Congress had the right to pass the Civil Rights Bill to secure the citizenship of the negro. *Smith v. Moody*, 26 Ind. 307.

In the matter of Elizabeth Turner, on *Habeas Corpus*, by Chief-Justice Chase (Maryland, 1867). And because of the Civil Rights Bill, the United States Circuit Court had jurisdiction of a *Habeas Corpus* case, to relieve a child of color from an apprenticeship, under the laws of Maryland, which were in conflict with that law. *Id.*

The apprenticeship, among other things, allowed the assignment of the apprentice's services by the master, with the sanction of the orphan's court. The Chief-Justice said: "The following propositions seem to me to be sound law, and they decide the case: First. The first clause of the thirteenth amendment to the Constitution of the United States interdicts slavery and involuntary servitude, except as a punishment for crime, and establishes freedom as the constitutional right of all persons in the United States. Second. The alleged apprenticeship in the present case is involuntary servitude within the meaning of these words in the amendment." *Id.*

This amendment is the last one made. It trenches directly upon the power of the States and of the people of the States. It is the first and only instance of a change of this character in the organic law. *United States v. Rhodes* (by Justice Swayne, Kentucky, Oct. T. 1867).

The act of Congress (the Civil Rights Bill) confers citizenship. Who are citizens of the United States? The Constitution uses the words "citizen" and "natural born citizen;" but neither that instrument nor any act of Congress has attempted to define their meaning. In Johnson's Dictionary, "citizen" is thus defined: "(1) A freeman of a city; not a foreigner; not a slave; (2) a townsman, a man of trade; not a gentleman; (3) an inhabitant; a dweller in any place." In Jacob's Law Dictionary (edition of 1783) the only definition given is as follows: "Citizens (*cives*) of London are either freemen or such as reside and keep a family in the city, &c.; and some are citizens and freemen, and some are not, who have not so great privileges as others. The citizens of London may prescribe against a statute because their liberties are re-enforced by statute. (1 Roll. 105.)" *Id.*

"The word *civis*, taken in the strictest sense, extends only to him that is entitled to the privileges of a city of which he is a member, and in that sense there is a distinction between a citizen and an inhabitant within the same city, for every inhabitant there is not a citizen." (*Scott qui tam v. Swartz*, Com. Rep. 68.) *Id.*

"A citizen is a freeman who has kept a family in a city." (*Roy v. Hanger*, 1 Roll. Rep. 138, 149.) *Id.*

500.

"The term citizen, as understood in our law, is precisely analogous to the term subject in the common law; and the change of phrase has entirely resulted from the change of government. The sovereignty has been changed from one man to the collective body of the people, and he who before was *a subject of the king is now a citizen of the State.*" (The State v. Manuel, 4 Dev. & Batt. 26.) Id.

What was
the effect of
the American Revolution upon
citizenship?
220.

"During the war each party claimed the allegiance of the natives of the colonies as due exclusively to itself. The Americans insisted upon the allegiance of all born within the States, respectively; and Great Britain asserted an equally exclusive claim. The treaty of 1783 acted upon the state of things as it existed at that period. It took the actual state of things as its basis. All those, whether natives or otherwise, who then adhered to the American States, were virtually absolved from their allegiance to the British crown, and those who then adhered to the British crown were deemed and held subjects of that crown. The treaty of peace was a treaty operating between the States on each side, and the inhabitants thereof: in the language of the seventh article, it was a 'firm and perpetual peace between his British majesty and the said States, and between the subjects of the one and the citizens of the other.' Who then were *subjects* or *citizens* was to be decided by the state of facts. If they were originally subjects of Great Britain and then adhered to her, and were claimed by her as subjects, the treaty deemed them such; if they were originally British subjects, but then adhering to the states, the treaty deemed them citizens." (Shanks v. Dupont, 3 Pet. 247.) United States v. Rhodes (Justice Swayne).

All persons born in the allegiance of the king are natural born subjects, and all persons born in the allegiance of the United States are natural born citizens. Birth and allegiance go together. Such is the rule of the common law, and it is the common law of this country as well as of England. There are two exceptions, and only two, to the universality of its application. The children of ambassadors are, in theory, born in the allegiance of the powers the ambassadors represent, and slaves, in legal contemplation, are property, and not persons. (2 Kent's Com. 3d ed. 1; Calvin's Case, 7 Coke, 1; 1 Black. Com. 366; Lynch v. Clark, 1 Sandf. Ch. Rep. 139.)

The common law has made no distinction on account of race or color. None is now made in England nor in any other Christian country of Europe. The fourth of the articles of confederation, (*ante*, p. 10) quoted; also Scott v. Sandford, 19 How. 575. Id. When the Constitution was adopted, free men of color were clothed with the franchise of voting in at least five States, and were a part of the people whose sanction breathed into it the breath of life. (Scott v. Sandford, 19 How. 573; The State v. Manuel, 2 Dev. & Batt. 24, 25.) United States v. Rhodes.

"Citizens under our Constitution and laws mean free inhabitants born within the United States or naturalized under the laws of Congress." (1 Kent's Com. 292, note.) It is further said in the note in 1st Kent's Commentaries, before referred to: "If a slave born in the United States be manumitted or otherwise lawfully discharged from bondage, or if a black man born in the United States become free, he becomes thenceforward a citizen, but under such disabilities as the laws of the several States may deem it expedient to prescribe to persons of color." Id.

In the case of the *State v. Manuel* it was remarked: "It has been ^{18, 220.} said that, by the Constitution of the United States, the power of naturalization has been conferred exclusively upon Congress, and therefore it cannot be competent for any State by its municipal regulations to make a citizen. But what is *naturalization*? It is the removal of the *disabilities of alienage*. Emancipation is the removal of the *incapacity* of slavery. The latter depends wholly upon the internal regulations of the State. The former belongs to the government of the United States. It would be dangerous to confound them." (*The State v. Manuel*, 2 Dev. & Batt. 25; *The State v. Newcomb*, 5 Iredell, 253.) Id.

We cannot deny the assent of our judgment to the soundness of the proposition, that the emancipation of a native-born slave by removing the disability of slavery made him a citizen. If these views be correct, the provision in the act of Congress conferring citizenship was unnecessary and is inoperative. Granting this to be so, it was well, if Congress had the power, to insert it, in order to prevent doubts and differences of opinion which might otherwise have existed upon the subject. We are aware that a majority of the court in the case of *Scott v. Sandford*, arrived at conclusions different from those we have expressed. But in our judgment these points were not before them. They decided that the whole case, including the agreed facts, was open to their examination, and that *Scott* was a slave. This central and controlling fact excluded all other questions, and what was said upon them by those of the majority, with whatever learning and ability the argument was conducted, is no more binding upon this court as authority than the views of the minority upon the same subjects. (*Carroll v. Carroll*, 16 How. 287.) Id.

Citizenship has no necessary connection with the franchise of voting, eligibility to office, or indeed with any other rights, civil or political. Women, minors, and persons *non compos* are citizens, and not the less so on account of their disabilities. In England, not to advert to the various local regulations, the new reform bill gives the right of voting for members of Parliament to about eight hundred thousand persons from whom it was before withheld. There, the subject is wholly within the control of Parliament. Here, until the 13th amendment was adopted, the power belonged entirely to the States, and they exercised it without question from any quarter, as absolutely as if they were not members of the Union. Id.

Our attention has been called to several treaties by which Indians were made citizens; to those by which Louisiana, Florida, and California were acquired, and to the act passed in relation to Texas. ^{220, 230, 117.} All this was done under the war and treaty-making powers of the Constitution, and those which authorize the national government to regulate the territory and other property of the United States, and to admit new States into the Union. (*American Ins. Co. v. Canter*, 1 Pet. 511; *Cross v. Harrison*, 16 How. 164; 2 Story's Const 158.) Id.

Congress has power "to establish a uniform rule of naturalization." Art. 1, Sec. 8. After considerable fluctuation of judicial opinion it was finally settled, by the Supreme Court, that this

What is the effect of citizenship upon suffrage? 18, 220.

500, 503.

power is vested exclusively in Congress. (*Collet v. Collet*, 2 Dall. 294; *United States v. Velati*, 2 Dall. 370; *Golden v. Prince*, 3 Wash. C. C. 313; *Chirac v. Chirac*, 2 Wheat. 259; *Houston v. Moore*, 2 Wheat. 49; *Federalist*, No. 32.) *United States v. Rhodes*. Id. An alien naturalized is "to all intents and purposes a natural born subject." (Co. Litt. 129.) Id. "Naturalization takes effect from birth; denization from the date of the patent." (*Vin. Ab. Tit. Alien, D.*) Id.

The form under the English act of Parliament appears in *Godfrey v. Dickson*, Cro. Jac. 539, c. 7. Under the late act, a resident alien may accomplish the object by a petition to the Secretary of State for the Home Department Id.

93.

The power is applicable only to those of foreign birth. Alienage is an indispensable element in the process. To make one of domestic birth a citizen, is not naturalization, and cannot be brought within the exercise of that power. There is an universal agreement of opinion upon this subject. (*Scott v. Sandford*, 19 How. p. 578; 2 *Story's Const.* 44.) Id. It was well remarked by one of the dissenting judges, in *Scott v. Sandford*, 19 Howard, 586, in regard to the African race: "The Constitution has not excluded them, and since that has conferred on Congress the power to naturalize colored aliens, it certainly shows that color is not a necessary qualification for citizenship under the Constitution of the United States." Id. The Constitution, 10th amendment, and clause 2 of Sec. 2, Art. IV., and generally the notes thereon (*ante*, notes 220, 221), quoted. Id.

267.

220-223.

What the several States under the original Constitution only could have done, the nation has done by the thirteenth amendment. An occasion for the exercise of this power by the States may not, perhaps cannot, hereafter arise. *United States v. Rhodes*.

The thirteenth amendment quoted, and the same rules of interpretation applied to "APPROPRIATE LEGISLATION." That is, "*appropriate*" is equivalent to "necessary and proper." (*McCulloch v. Maryland*, 4 Wheat. 421-423.) Id.

183.

The rule in the *United States v. Coombs*, 12 Pet. 72; *United States v. Holliday*, 3 Wall. 407; *United States v. Beavan*, 3 Wheat. 390; *Prigg v. Pennsylvania*, 16 Pet. 60; quoted and applied as to the general power. Id. [Out of its place it may be noted, that under the power to regulate commerce, it has recently been ruled, that the power extends to commerce on land, carried on by railroads which are parts of lines of inter-State communication, as well as to commerce carried on by vessels, and such railroads may be regulated by Congress as well as steamboats. By Associate Justice Miller, in *Gray v. Clinton Bridge*, *American Law Register* (January, 1868), pp. 149-

85.

154. The power to regulate commerce is the power to regulate the instruments of commerce. (*Cooley v. The Board of Wardens*, 12 How. 316.) Id. And it extends to railroads as well as steamboats. Id.]

89.

195.

Since the organization of the Supreme Court, but three acts of Congress have been pronounced by that body void for unconstitutionality. (*Marbury v. Madison*, 1 Cr. 137; *Scott v. Sandford*, 19 How. 393; *Ex parte Garland*, 4 Wall. 334.) *United States v. Rhodes*.

The present effect of the amendment was to abolish slavery

wherever it existed within the jurisdiction of the United States. In the future it throws its protection over every one, of every race, color, and condition, within that jurisdiction, and guards them against the recurrence of the evil. *Id.* 501.

The history of slavery, and the State legislation which followed its destruction given. The Civil Rights law is an "appropriate" means of carrying out the object of the first section of the amendment. *Id.*

It would be a remarkable anomaly if the national government, without this amendment, could confer citizenship on aliens of every race or color, and citizenship, with civil and political rights, on the "inhabitants" of Louisiana and Florida, without reference to race or color, and cannot, with the help of the amendment, confer on those of the African race, who have been born and always lived within the United States, all that this law seeks to give them. 18, 220.

It was passed by the Congress succeeding the one which proposed the amendment. Many of the members of both Houses were the same. This fact is not without weight and significance. (*McCulloch v. Maryland*, 4 *Wheat.* 401.) *Id.*

The amendment reversed and annulled the original policy of the Constitution, which left it to each State to decide exclusively for itself whether slavery should or should not exist as a local institution, and what disabilities should attach to those of the servile race within its limits. The whites needed no relief nor protection, and they are practically unaffected by the amendment. The emancipation which it wrought was an act of great national grace, and was doubtless intended to reach further in its effects, as to every one within its scope, than the consequences of manumission by a private individual. We entertain no doubt of the constitutionality of the act in all its provisions. It gives only certain civil rights. We are not unmindful of the opinion of the Court of Appeals of Kentucky, in the case of *Brown v. The Commonwealth*. With all our respect for the eminent tribunal from which it proceeded, we have found ourselves unable to concur in its conclusions. The constitutionality of the act is sustained by the Supreme Court of Indiana and the Chief-Justice of the Court of Appeals of Maryland, in able and well-considered opinions. (*Smith v. Moody*, 26 *Ind.* 307; *In re A. H. Somers*.) *United States v. Rhodes.* *Id.*

The *nisi prius* courts of several of the Southern States have decided against the constitutionality of the Civil Rights law on various grounds; but the editor regrets that he has not preserved the newspaper reports of their decisions.

Where an obligation was given to pay £7,800 sterling for a transfer of the vendor's claim to the services of 153 apprentices (who had been slaves), but before the installments fell due, the slaves were declared free and obtained their freedom, under an ordinance of Berbice, in British Guiana, in pursuance of the act of 3 and 4 *W. IV.*, c. 73, S. 10, whereby the defendant lost the services, so that the covenant of warranty of title failed; held, that the plaintiff was entitled to the last two installments, though the legislature had determined the apprenticeship before they became due. *Mittelhozeer v. Fullarton*, 6 *Adolph. & Ellis*, 989, 990.

What effect
had such a
law upon
contracts?

499.

Lord Denman : " My brother Wightman asked what would have been the result if, at the end of the year, the services had been determined by the act of God. And to this no sufficient answer was given." Id. 1018. The plaintiff's right vested when the bargain was made; the subsequent interference of the colonial legislature does not prevent his recovering what was then stipulated. Id. The whole question is, who shall bear the losses occasioned by a *vis major*. And that depends upon the question, who was the proprietor when that loss was occasioned. Id.

The question was whether the defendants were liable for the value of slaves purchased in Texas in September, 1863. " I have always regarded the proclamation of the President, issued on the 1st January, 1863, declaring the negroes free, as a war measure. The President did not base his right to issue that proclamation upon any clause of the Constitution, or even any act of Congress. It was justified by the necessities of the war, and, as commander-in-chief of the army and navy of the United States, he resorted to it, as he himself declared, as a *war measure*. Its operation and effect depended wholly upon the success of the national arms. The negroes were set free, not by the mere declaration of the President that they were so, but by force of arms. Hence, I have always supposed that slaves who occupied certain sections of the country, say in Virginia and Tennessee, and who first fell under the armed control of the Union, were free sooner than those in Texas or the extreme South. If the proclamation of the President, of itself, made slaves free persons, then every negro held in bondage after the 1st January, 1863, is now entitled to sue not only for the value of his services subsequent to that time, and for damages on account of being unlawfully deprived of his liberty, but could also subject their former owners to criminal prosecutions for false imprisonment. Not believing that such an effect should be, or was intended to be given to the Proclamation, I must sustain the demurrer of the plaintiff." *Connett v. Williams*, United States Circuit Court (Texas), Jan. T., 1866, by Judge Thomas H. Duval. There have been State decisions to the effect that contracts made for the purchase of negroes, even before the war, but which matured after their emancipation, cannot be enforced; but the editor has not preserved the newspaper reports of them. He supposes the correct principle to be, as stated by the English bench, " Who owned the negroes when they obtained their freedom?" If they were property when sold, the purchaser must sustain the loss.

[CONCURRENT RESOLUTION, RECEIVED AT DEPARTMENT OF STATE
JUNE 16, 1866.]

JOINT RESOLUTION PROPOSING AN AMENDMENT TO
THE CONSTITUTION OF THE UNITED STATES.

Who are
citizens
of the
United
States?

Be it resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of both Houses concurring)

That the following article be proposed to the legislatures of the several States as an amendment to the Constitution of the United States, which, when ratified by three-fourths of said legislatures, shall be valid as part of the Constitution, namely:

ARTICLE XIV.

SEC. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

SEC. 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, representatives in Congress, the executive and judicial officers of a State, or the members of the legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SEC. 3. No person shall be a senator or representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having

How are
representa-
tives appor-
tioned?
21-24.

506, 507,
509.

How is the
basis
reduced?

Who are dis-
qualified
from hold-
ing office?

510-512

previously taken an oath, as a member of Congress, or as any officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may, by a vote of two-thirds of each House, remove such disability.

How re-
stored?

How is the
public debt
guaran-
teed?

The rebel
debt, how
repudiated?

SEC. 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void.

SEC. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

236. **275.** This amendment was never submitted to the President for his approval or veto. In a message to Congress, he said, that the sending it to the States was not to be construed into an approval of its provisions. Nevertheless, it was sent by the Secretary of State to all the States.

In a letter of transmission to the editor, on the 29th October, 1867, the Secretary of State remarks: "I also send an accurate copy (of the fourteenth amendment) as proposed by Congress; but as this amendment has not yet been ratified by a sufficient number of the States, through their legislatures, agreeably to the requirements of the Constitution, it is not deemed expedient in this case to promulgate any official data in relation thereto."

Application was then made to the clerk of the House of Representatives who politely furnished the following:—

Dates of the ratification of the XIVth constitutional amendment. 1866: Connecticut, June 30; New Hampshire, July 7; Tennessee, July 19; New Jersey, September 11; Oregon, September 19; Vermont, November 7. 1867: New York, January 10; Ohio, January 11 (withdrawn Jan. 1868); Nevada, January 11 and 22; Illinois, January 15; West Virginia, January 16; Kansas, January 18; Missouri, January 26; Indiana, January 29; Minnesota, February 1; Rhode Island, February 7; Pennsylvania, February 13;

Wisconsin, February 13; Michigan, February 15, Massachusetts, ^{Has been} March 15 and 20; Nebraska, June 15. Rejected by Delaware, ^{ratified.} Maryland, Kentucky, Virginia, North Carolina, South Carolina, Georgia, Florida, Alabama, Louisiana, Mississippi, Arkansas, Texas. Not acted: California, Iowa.

Ratified by 22 States; rejected by 13; not acted on by 2. When submitted there were 36 States; Nebraska added, makes 37. Three-fourths of all were 27, now 28. If we deduct the ten rebel States, 19 would be sufficient.

In the case of *Mississippi v. Johnson*, 4 Wall. 475, it was sought to enjoin the operation of these laws upon the ground of their unconstitutionality. The arguments are fully reported; but the court limited the inquiry to the single point, Can the President be restrained by injunction from carrying into effect an act of Congress alleged to be unconstitutional? After reviewing *Marbury v. Madison*, 1 Cr. 137, and *Kendall v. Stockton & Stokes*, 12 Pet. 527, it was said: "The Congress is the legislative department of the government; the President is the executive department. Neither can be restrained in its action by the judicial department; though the acts of both, when performed, are, in proper cases, subject to its cognizance." *Mississippi v. Johnson*, 4 Wall. 500. The rule was denied. *Id.* 501. 14, 165. 195

There are many persons whose opinions are entitled to respect, who maintain that the ratification is complete without the concurrence of the non-reconstructed States. (See Farrar's Const. § 448, note 1.) If this view be correct, then the ratification is already accomplished, and the fourteenth amendment stands as a part of the Constitution. But if it be not correct, the editor doubts not that the amendment will be adopted within the present year, by enough of those ten States (*unless prevented by civil war*), to insure its ratification, after the same manner that the thirteenth amendment was ratified. It has therefore been printed, to prevent future confusion, in the index, and stereotyped pages. Should it never go into practical operation, the constitutional student will reject the propositions which it embraces. It has been seen that the Secretary of State discards the notion that the amendment is yet complete. It is also painfully true, that in a message to the Senate, and in other public declarations, the President questioned the expediency, if he did not deny the power of Congress to submit this amendment, while a portion of the States were not represented and allowed to vote upon such submission. But this argument would also go to the thirteenth amendment, unless, indeed, there be a distinction between the rights of States of the Union, when engaged in actual war against the United States, and after that resistance has been conquered and such rebellious peoples have sent back their representatives to Congress. 286. 274. 236. 274. 117, 118. 46.

276. It has been seen that the President imposed upon these same States the condition of adopting the thirteenth amendment, and thus forever destroyed slavery within the jurisdiction of the United States. This was claimed in virtue of the war power, and for the general welfare of the whole Union. The thing has been done, and the complete change of organic law has gone into history. 274. 11, 79, 80.

286.

The country accepted the act, and there were those who thought this enough. But Congress, adopting the view that further amendments were necessary; and, either holding that the ratification of three-fourths of all the States was required; or else wishing to test the fact, that these States so lately in rebellion, had given evidence of loyalty and submission, and claiming for Congress the power to impose further conditions than the President had demanded, with a view to secure liberty and equal political rights to all, and to compel those States to ratify the amendment, enacted the following series of laws:—

Act of
March 2,
1867.

"An Act to provide for the more efficient Government of the Rebel States."

Preamble ?

"WHEREAS no legal State governments or adequate protection for life or property now exists in the rebel States of Virginia, North Carolina, South Carolina, Georgia, Mississippi, Alabama, Louisiana, Florida, Texas, and Arkansas; and whereas it is necessary that peace and good order should be enforced in said States, until loyal and republican State governments can be legally established; therefore,

How are
certain rebel
States to be
divided,
and subject-
ed to
military
authority ?

"Be it enacted, &c., That said rebel States shall be divided into military districts, and made subject to the military authority of the United States as hereinafter prescribed, and for that purpose Virginia shall constitute the first district; North Carolina and South Carolina, the second district; Georgia, Alabama, and Florida, the third district; Mississippi and Arkansas, the fourth district; and Louisiana and Texas, the fifth district.

Is the
President
to assign an
army officer
to command
each dis-
trict ?

"2. It shall be the duty of the President to assign to the command of each of said districts, an officer of the army, not below the rank of brigadier-general, and to detail a sufficient military force to enable such officer to perform his duties, and enforce his authority within the district to which he is assigned.

Military
force to be
detailed ?
What are
the duties
of command-
ers of
districts ?
Local civil
tribunals ?
State inter-
ference de-
clared null ?

"3. It shall be the duty of each officer assigned as aforesaid, to protect all persons in their rights of person and property, to suppress insurrection, disorder, and violence, and to punish, or cause to be punished, all disturbers of the public peace and criminals; and to this end he may allow local civil tribunals to take jurisdiction of and to try offenders, or, when in his judgment it may be necessary for the trial of offenders, he shall have power to organize military commissions or tribunals for that purpose, and all interference under color of State authority with the exercise of military authority under this act, shall be null and void.

Persons
under
military
arrest to be
speedily
tried ?

"4. All persons put under military arrest by virtue of this act shall be tried without unnecessary delay, and no cruel or unusual punishment shall be inflicted, and no sentence of any military commission or tribunal hereby authorized, affecting the life or liberty of any person, shall be executed until it is approved by the officer in command of the district, and the laws and regulations for the government of the army shall not be affected by this act, except in so far as they conflict with its provisions: *Provided*, That no sentence of death under the provisions of this act shall be carried into effect without the approval of the President.

What rule
of punish-
ment ?
How are
sentences of
military
tribunals to
be executed ?

"5. When the people of any one of said rebel States shall have formed a constitution of government in conformity with the Constitution of the United States in all respects, framed by a convention of delegates elected by the male citizens of said State, twenty-one years old and upward, of whatever race, color, or previous condition, who have been resident in said State for one year previous to the day of such election, except such as may be disfranchised for participation in the rebellion, or for felony at common law, and when such Constitution shall provide that the elective franchise shall be enjoyed by all such persons as have the qualifications herein stated for electors of delegates, and when such Constitution shall be ratified by a majority of the persons voting on the question of ratification who are qualified as electors for delegates, and when such Constitution shall have been submitted to Congress for examination and approval, and Congress shall have approved the same, and when said State, by a vote of its legislature elected under said Constitution, shall have adopted the amendment to the Constitution of the United States, proposed by the Thirty-ninth Congress, and known as article fourteen, and when said article shall have become a part of the Constitution of the United States, said State shall be declared entitled to representation in Congress, and senators and representatives shall be admitted therefrom on their taking the oath prescribed by law, and then and thereafter the preceding sections of this act shall be inoperative in said State: *Provided*, That no person excluded from the privilege of holding office by said proposed amendment to the Constitution of the United States, shall be eligible to election as a member of the convention to frame a Constitution for any of said rebel States, nor shall any such person vote for members of such convention.

Upon what conditions are States entitled to representation in Congress? Delegates to conventions, by whom elected? What is the elective franchise?

The State to adopt the amendment to the Constitution?

What qualifications of senators and representatives?

What are the civil governments of such States? Who may vote in elections?

"6. Until the people of said rebel States shall be by law admitted to representation in the Congress of the United States, any civil governments which may exist therein shall be deemed provisional only, and in all respects subject to the paramount authority of the United States at any time to abolish, modify, control, or supersede the same; and in all elections to any office under such provisional governments all persons shall be entitled to vote, and none others, who are entitled to vote, under the provisions of the fifth section of this act; and no person shall be eligible to any office under any such provisional governments who would be disqualified from holding office under the provisions of the third article of said constitutional amendment."

This act was passed over the President's veto, March 2, 1867.

"AN ACT supplementary to an act entitled 'An act to provide for the more efficient government of the rebel States,' passed March second, eighteen hundred and sixty-seven, and to facilitate restoration.

Act of March 23, 1867.

"*Be it enacted, &c.*, That before the first day of September, eighteen hundred and sixty-seven, the commanding general in each district defined by an act entitled 'An act to provide for the more efficient government of the rebel States,' passed March second, eighteen hundred and sixty-seven, shall cause a registration to be made of

Who are entitled to be registered as voters?

Oath. the male citizens of the United States, twenty-one years of age and upwards, resident in each county or parish in the State or States included in his district, which registration shall include only those persons who are qualified to vote for delegates by the act aforesaid, and who shall have taken and subscribed the following oath or affirmation: 'I, —, do solemnly swear (or affirm), in the presence of Almighty God, that I am a citizen of the State of —; that I have resided in said State for — months next preceding this day, and now reside in the county of —, or the parish of —, in said State (as the case may be); that I am twenty-one years old; that

What oath of the voters? 282. I have not been disfranchised for participation in any rebellion or civil war against the United States, nor for felony committed against the laws of any State or of the United States; that I have never been a member of any State legislature, nor held any executive or judicial office in any State and afterward engaged in insurrection or rebellion against the United States, or given aid or comfort to the enemies thereof; that I have never taken an oath as a member of Congress of the United States, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, and afterward engaged in insurrection or rebellion against the United States, or given aid or comfort to the enemies thereof; that I will faithfully support the Constitution and obey the laws of the United States, and will, to the best of my ability, encourage others so to do, so help me God;' which oath or affirmation may be administered by any registering officer.

When and by whose order is the election to be held?

"2. After the completion of the registration hereby provided for in any State, at such time and places therein as the commanding general shall appoint and direct, of which at least thirty days' public notice shall be given, an election shall be held of [for] delegates to a convention for the purpose of establishing a Constitution and civil government for such State loyal to the Union, said convention in each State, except Virginia, to consist of the same number of members as the most numerous branch of the State legislature of such State in the year eighteen hundred and sixty, to be apportioned among the several districts, counties, or parishes of such State by the commanding general, giving to each representation in the ratio of voters registered as aforesaid as nearly as may be. The convention in Virginia shall consist of the same number of members as represented the territory now constituting Virginia in the most numerous branch of the legislature of said State in the year eighteen hundred and sixty, to be apportioned as aforesaid.

How to vote for or against a convention?

"3. At said election the registered voters of each State shall vote for or against a convention to form a Constitution therefor under this act. Those voting in favor of such a convention shall have written or printed on the ballots by which they vote for delegates, as aforesaid, the words 'For a convention;' and those voting against such a convention shall have written or printed on such ballots the words 'Against a convention.' The persons appointed to superintend said election, and to make return of the votes given thereat, as herein provided, shall count and make return of the votes given for and against a convention; and the commanding general to whom the same shall have been returned shall ascertain and declare the

total vote in each State for and against a convention. If a majority of the votes given on that question shall be for a convention, then such convention shall be held as hereinafter provided; but if a majority of said votes shall be against a convention, then no such convention shall be held under this act: *Provided*, That such convention shall not be held unless a majority of all such registered voters shall have voted on the question of holding such convention. Vote.

“4. The commanding general of each district shall appoint as many boards of registration as may be necessary, consisting of three loyal officers or persons, to make and complete the registration, superintend the election, and make return to him of the votes, list of voters, and of the persons elected as delegates by a plurality of the votes cast at said election; and upon receiving said returns he shall open the same, ascertain the persons elected as delegates, according to the returns of the officers who conducted said election, and make proclamation thereof; and if a majority of the votes given on that question shall be for a convention, the commanding general, within sixty days from the date of election, shall notify the delegates to assemble in convention, at a time and place to be mentioned in the notification, and said convention, when organized, shall proceed to frame a Constitution and civil government according to the provisions of this act, and the act to which it is supplementary; and when the same shall have been so framed, said Constitution shall be submitted by the convention for ratification to the persons registered under the provisions of this act at an election to be conducted by the officers or persons appointed, or to be appointed, by the commanding general, as hereinbefore provided, and to be held after the expiration of thirty days from the date of notice thereof, to be given by said convention; and the returns thereof shall be made to the commanding general of the district. How are boards of registration to be appointed?

“5. If, according to said returns, the Constitution shall be ratified by a majority of the votes of the registered electors qualified as herein specified, cast at said election, at least one-half of all the registered voters voting upon the question of such ratification, the president of the convention shall transmit a copy of the same, duly certified, to the President of the United States, who shall forthwith transmit the same to Congress, if then in session, and if not in session, then immediately upon its next assembling; and if it shall moreover appear to Congress that the election was one at which all the registered and qualified electors in the State had an opportunity to vote freely and without restraint, fear, or the influence of fraud, and if the Congress shall be satisfied that such Constitution meets the approval of a majority of all the qualified electors in the State, and if the said Constitution shall be declared by Congress to be in conformity with the provisions of the act to which this is supplementary, and the other provisions of said act shall have been complied with, and the said Constitution shall be approved by Congress, the State shall be declared entitled to representation, and senators and representatives shall be admitted therefrom as therein provided. What to be done with the Constitution?

“6. All elections in the States mentioned in the said ‘Act to provide for the more efficient government of the rebel States.’ shall, How are the votes to be cast?

Ballot.

during the operation of said act, be by ballot; and all officers making the said registration of voters and conducting said elections shall, before entering upon the discharge of their duties, take and subscribe the oath prescribed by the act approved July second, eighteen hundred and sixty-two, entitled 'An act to prescribe an oath of office:' *Provided*, That if any person shall knowingly and falsely take and subscribe any oath in this act prescribed, such person so offending, and being thereof duly convicted, shall be subject to the pains, penalties, and disabilities which by law are provided for the punishment of the crime of willful and corrupt perjury.

What is the penalty of false swearing?

How are the expenses to be paid?

"7. All expenses incurred by the several commanding generals, or by virtue of any orders issued, or appointments made, by them, under or by virtue of this act, shall be paid out of any moneys in the treasury not otherwise appropriated.

How are the salaries &c., to be paid?

"8. The convention for each State shall prescribe the fees, salary, and compensation to be paid to all delegates and other officers and agents herein authorized or necessary to carry into effect the purposes of this act not herein otherwise provided for and shall provide for the levy and collection of such taxes on the property in such State as may be necessary to pay the same.

"9. The word 'article,' in the sixth section of the act to which this is supplementary, shall be construed to mean 'section.'"

Passed over the President's veto, March 23, 1867.

Act of July 18, 1867.

"AN ACT supplementary to an act entitled 'An act to provide for the more efficient government of the rebel States,' passed on the second day of March, eighteen hundred and sixty-seven, and the act supplementary thereto, passed on the twenty-third day of March, eighteen hundred and sixty-seven.

What are the governments of the States declared to be?

"*Be it enacted*, &c., That it is hereby declared to have been the true intent and meaning of the act of the second day of March, one thousand eight hundred and sixty-seven, entitled 'An act to provide for the more efficient government of the rebel States,' and of the act supplementary thereto, passed on the twenty-third day of March, in the year one thousand eight hundred and sixty-seven, that the governments then existing in the rebel States of Virginia, North Carolina, South Carolina, Georgia, Mississippi, Alabama, Louisiana, Florida, Texas, and Arkansas were not legal State governments; and that thereafter said governments, if continued, were to be continued subject in all respects to the military commanders of the respective districts, and to the paramount authority of Congress.

What is the power of removal?

"2. The commander of any district named in said act shall have power, subject to the disapproval of the general of the army of the United States, and to have effect till disapproved, whenever in the opinion of such commander the proper administration of said act shall require it, to suspend or remove from office, or from the performance of official duties and the exercise of official powers, any officer or person holding or exercising, or professing to hold or exercise, any civil or military office or duty in such district, under any power, election, appointment or authority derived from, or granted by, or claimed under, any so-called

State or the government thereof, or any municipal or other division State. thereof, and upon such suspension or removal, such commander, subject to the disapproval of the general as aforesaid, shall have power to provide from time to time for the performance of the said duties of such officer or person so suspended or removed, by the detail of some competent officer or soldier of the army, or by the appointment of some other person, to perform the same, and to fill vacancies occasioned by death, resignation, or otherwise.

"3. The general of the army of the United States shall be invested with all the powers of suspension removal, appointment, and detail granted in the preceding section to district commanders. What are the powers of the General as to removals?

"4. The acts of the officers of the army already done in removing in said districts persons exercising the functions of civil officers, and appointing others in their stead, are hereby confirmed: *Provided*, That any person heretofore or hereafter appointed by any district commander to exercise the functions of any civil office, may be removed either by the military officer in command of the district, or by the general of the army. And it shall be the duty of such commander to remove from office as aforesaid all persons who are disloyal to the government of the United States, or who use their official influence in any manner to hinder, delay, prevent, or obstruct the due and proper administration of this act and the acts to which it is supplementary.

"5. The boards of registration provided for in the act entitled 'An act supplementary to an act entitled "An act to provide for the more efficient government of the rebel States," passed March two, eighteen hundred and sixty-seven, and to facilitate restoration,' passed March twenty-three, eighteen hundred and sixty-seven, shall have power, and it shall be their duty, before allowing the registration of any person, to ascertain, upon such facts or information as they can obtain, whether such person is entitled to be registered under said act; and the oath required by said act shall not be conclusive on such question, and no person shall be registered unless such board shall decide that he is entitled thereto; and such board shall also have power to examine, under oath (to be administered by any member of such board), any one touching the qualification of any person claiming registration; but in every case of refusal by the board to register an applicant, and in every case of striking his name from the list as hereinafter provided, the board shall make a note or memorandum, which shall be returned with the registration list to the commanding general of the district setting forth the grounds of such refusal or such striking from the list: *Provided*, That no person shall be disqualified as member of any board of registration by reason of race or color. What are the duties of the board of registration?

"6. The true intent and meaning of the oath prescribed in said supplementary act is (among other things), that no person who has been a member of the legislature of any State, or who has held any executive or judicial office in any State, whether he has taken an oath to support the Constitution of the United States or not, and whether he was holding such office at the commencement of the rebellion, or had held it before, and who has afterwards engaged in insurrection or rebellion against the United States, or What is the extent of the disqualification?

given aid or comfort to the enemies thereof, is entitled to be registered or to vote; and the words 'executive or judicial office in any State' in said oath mentioned shall be construed to include all civil offices created by law for the administration of any general law of a State, or for the administration of justice.

To what time is the registration extended?

"7. The time for completing the original registration provided for in said act may, in the discretion of the commander of any district, be extended to the first day of October, eighteen hundred and sixty-seven, and the boards of registration shall have power, and it shall be their duty, commencing fourteen days prior to any election under said act, and upon reasonable public notice of the time and place thereof, to revise, for a period of five days, the registration lists, and upon being satisfied that any person not entitled thereto has been registered, to strike the name of such person from the list, and such person shall not be allowed to vote. And such board shall also, during the same period, add to such registry the names of all persons who at that same time possess the qualifications required by said act who have not been already registered; and no person shall, at any time, be entitled to be registered, or to vote, by reason of any executive pardon or amnesty, for any act or thing which, without such pardon or amnesty, would disqualify him from registration or voting.

What are the powers of the commanding general?

"8. Section four of said last-named act shall be construed to authorize the commanding general named therein, whenever he shall deem it needful, to remove any member of a board of registration, and to appoint another in his stead, and to fill any vacancy in such board.

What oath is required of the board?

"9. All members of said boards of registration and all persons hereafter elected or appointed to office in said military districts, under any so-called State or municipal authority, or by detail or appointment of the district commanders, shall be required to take and to subscribe the oath of office prescribed by law for officers of the United States.

By whose opinions are the district commanders bound?

"10. No district commander or member of the board of registration, or any of the officers or appointees acting under them, shall be bound in his action by any opinion of any civil officer of the United States.

"11. All the provisions of this act, and of the acts to which this is supplementary, shall be construed liberally to the end that all the intents thereof may be fully and perfectly carried out."

Passed over the President's veto, 19th July, 1867.

"JOINT RESOLUTION to carry into effect the several acts providing for the more efficient government of the rebel States.

"*Be it resolved, &c.,* That, for the purpose of carrying into effect the above named acts, there be appropriated, out of any money in the treasury not otherwise appropriated, the sum of one million dollars."

Passed over the President's veto, 19th July, 1867.

What meant the second section of the amendment?

277. It will be seen that the second section of the fourteenth amendment only contemplated the rejection from the basis of representation of the "numbers," whose male representative men should be denied the elective franchise. This applied especially to the free

persons of color. Upon the estimate of four and a half mil-^{21, 23.} lions of those, very few of whom are allowed to vote, unless the rule of suffrage should be changed, nearly one-eighth of the whole representation would have to be deducted. Nearly all of this would, in fact, fall upon the late slave States, and the greater part upon the remaining ten rebel States. The reconstruction acts advance one step further. They still recognize the principle that the States may determine for themselves who of their inhabitants may vote; but, as in the case of Nebraska, it is imposed "as a fundamental condition of admission" that these States shall make no distinction, as to the right of suffrage, on account of color. While, then, it was intended to enforce the adoption of the constitutional amendment, if the law imposed the burden of negro suffrage, it also secured to the unwilling whites the benefit of the increased representation which would have been lost without this principle. While the means adopted have been denounced as onerous, and the executive and judicial departments of the government have been appealed to to arrest them, the candid historian will have to record, that the object of this legislation has been to secure the fourteenth amendment to the Constitution. And, viewed as a revolution in organic law, superinduced by the mighty events which preceded, the friends and the opponents of the measure will have to be judged, as they are being judged in regard to the thirteenth amendment, by the question of whether it was right, expedient and wise thus to secure the fruits of the victory which prevented the destruction of the Union? If the end shall be approved, the severities of the war and the great loss of property, in the one case, and the complaints of the unfortunate men, who fought against a beneficent government, in the other, will be forgotten.

What is the effect of suffrage to the negroes?
17.

275.

By what rule will the friends and opponents have to be judged?
275.

278. Under these laws the voters registered have been as follows:

Compare the black and white vote?

	<i>Whites.</i>	<i>Blacks.</i>	<i>Total.</i>
Alabama.....	72,746	93,543	166,289
Arkansas.....	43,170	23,146	66,316
Florida.....	11,151	15,541	26,692
Georgia.....	96,262	95,973	192,235
Louisiana.....	45,169	83,249	128,418
Mississippi.....	47,434	62,091	109,525
North Carolina.....	103,060	71,657	174,717
South Carolina.....	46,676	80,714	127,390
Texas.....	56,666	47,430	104,096
Virginia.....	120,101	105,832	225,933
Aggregates.....	642,435	679,176	1,321,611

—*The World Almanac*, pp. 102-106.

In 1860, the white vote of the same States was about 652,000. But it is estimated that 300,000, who would have been voters, lost their lives by the civil war. Probably 100,000 were either excluded, under the acts of Congress, or else failed to register. And yet there seems to be a falling off of less than 10,000. The vote of West Virginia is also to be deducted from the vote of Virginia. The conventions have been carried and delegates elected in all the

Texas.

17.

States except Texas. In that State an election has been ordered to take place on the 10th, 11th, 12th, 13th and 14th of February, 1868. The conventions of Alabama, Virginia, North Carolina, Georgia, Florida, and Arkansas have adopted the principle of suffrage for whites and blacks alike.

The new Constitutions will be submitted to the people for their ratification; and a bill has passed the House of Representatives, and may become a law, to secure the ratification by a simple majority of the votes cast; and to elect members of Congress at the same time. Should the Constitutions be ratified, and State officers elected under them, the contest may possibly then arise between the new governments thus organized and the governments intended to be superseded. But whatever form the controversy may assume, no candid mind should ever lose sight of the fact, that the great issue is, Shall the fourteenth amendment be ratified by those States not now allowed representation or not?

What do the amendments propose?

The first?

6, 19, 25, 28, 93, 163, 169, 220-223.

279. In view of so important an issue, it may be well for every reader to consider carefully what this amendment proposes or has done? This may be answered thus:—

SEC. 1. Defines national citizenship, and thus makes organic what had already been declared law by the first section of the Civil Rights Bill. Paschal's Annotated Digest, Art. 5382. See Farrar's Const. § 448.

220-225, 245-274.

260, 264.

All else in this section has already been guarantied in the second and fourth sections of the fourth article; and in the thirteen amendments. The new feature declared is that the general principles, which had been construed to apply only to the national government, are thus imposed upon the States. Most of the States, in general terms, had adopted the same bill of rights in their own constitutions.

The second?

21-24, 276.

17, 18, 220, 221.

What is the effect of curtailment of suffrage?

18.

16-18.

173, 174, 269.

280. The second section amends the third clause of the second section of the first article, so as to make representation depend upon voters as well as numbers. It thus more clearly defines who of those "persons," now "citizens," shall be counted in the basis of representation. Curtailment of representation will follow curtailment of suffrage. But the rights of the States to determine who of their inhabitants shall vote seems still to be left unimpaired.

This view, however, has been denied; and there are those of great weight, who claim that Congress has the power to prescribe an universal rule of suffrage for all the States. Putting it upon the ground of a right still retained by the States and people, it is not probable that any State would long exclude a large class of voters at the expense of its weight of representation in the national assembly and the electoral college. The prejudice against caste would be overcome by the necessity for strength.

The third?

242, 276.

221, 222, 215.

281. The third section contains a decree of exclusion from office, against all, everywhere, and for the past as well as future, who, having previously taken an oath as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged

in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. Disqualifica-
tion.

One of the complaints against the reconstruction laws has been, What is the effect of the disqualification?

that this same disqualification has been extended to the right to vote upon all the measures of reconstruction; and that so large a class has thus been excluded that "negro supremacy" has been established in all those ten States. It is no part of this book to defend or denounce any policy. The truth is, that the disqualification did not and could not reach any voter under twenty-seven years of age; it could reach comparatively few below thirty-five; and in no community is there an alarming number above fifty years of age. Neither by statistical possibility nor by count, has it been found fairly to extend to one-tenth part of the population. Upon Attorney-General Stanbery's interpretation, one-twentieth would be much nearer the number. (Opinions upon the Reconstruction Laws, 1867.) It does, however, reach a class; and the disqualification would extend to future as well as to past rebellions, and the power of holding office, or *disability* could only be removed by a

What per-
centage
could it
possibly
reach?

277.

242.

two-thirds vote of each house of Congress. 16-18, 220-223.

And as the country seems to have settled down into the notion, 16-19, 35, 46, that the elective franchise and the qualification for office are powers, which always require something superadded to mere citizenship, the disqualification as an organic rule for the future becomes one of wisdom and sound policy. I say nothing of the argument that it is a punishment for past offenses against the efficacy of executive pardon. As the number of participants in past rebellions will daily decrease, let us hope that the love of office, the very strongest in the restless, ambitious spirits, who always control popular sentiment, may render it almost impossible that ever the section shall extend to others who shall hereafter engage in insurrection or rebellion against the United States. 142, 143.

117

"STATE" in this section would doubtless be interpreted, as in the fugitive clauses, to extend to the District of Columbia and the Territories, and, indeed, to all who owed allegiance to the United States, and had held an office within the category of those defined. 226, 215, 242. And "PERSON" would receive the most comprehensive definition.

282. The fourth section declares, that "the validity of the public debt of the United States, authorized by law, including debts incurred for the payment of pensions and bounties for services in suppressing insurrection or rebellion shall not be questioned." While this has been supposed to relate to the debt contracted in the suppression of the late rebellion, it is, in fact, an organic pledge for all debts contracted in the past and for the future. The debt is not only not to be repudiated, but "not questioned." What is the fourth section? What debts does it embrace? 78, 82.

While so large a debt is thus intended to be secured, the section further stipulates: "But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void." What debts are stipulated not to be paid?

The debt of the Confederate States could not have been less than two thousand millions of dollars; and the value of the slaves amounts? What are the probable amounts?

Emancipa-
tion.

emancipated exceeded that sum. The debts incurred by States, counties, corporations, and individuals in aid of insurrection or rebellion against the United States, probably amount to a thousand millions more, to say nothing of pensions and "bounties for services," if one clause of the article is to be consulted in expounding the other. The terms of reconstruction prescribed by President Johnson required the States to repudiate their war debts. This has been done to a more or less limited extent in the constitutions and ordinances of the reconstruction conventions. But this is only for the protection of the States. Every one will judge for himself of the influence of such a debt, combined with the danger of having so large a national debt "questioned" or repudiated.

13, 82.

The problem of allowing the representations from States withdrawn from Congress and incurring such enormous debts of their own, while fighting the United States, an equal voice in reference to debts incurred by the nation in conquering them, is one of no small difficulty. Viewed from the stand-point of extraneous influences upon Congress, no one can now fully comprehend its danger. The organic guaranty is only an additional security.

The fifth?

138.

283. The fifth section is little more than a repetition of the general powers of legislation. It is precisely the same expressed in the thirteenth amendment.

274.

"The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." The appropriate legislation which would arise under this article, would be governed by time and circumstances, just as all the other powers of Congress have been.

What is the
importance
of the
subject?

274.

284. Whether this constitutional amendment has become, or shall become, a part of the organic law, as covenant for the great future, is a matter for the serious contemplation of the whole country. In the late very able message of the President, he recommends Congress to retrace the measures of the past. This cannot be understood to recommend the annulment of the thirteenth constitutional amendment. He is very explicit in opposing the reconstruction laws; and therefore he may be construed as recommending the repeal of the Civil Rights Bill, and opposing this whole fourteenth amendment, with no other recommendation in its stead, than to allow the representation from the States elected since the acts of reconstruction, directed by the President himself. Few, if any, of these persons, could take the test oath now required of all. But whether this is to be repealed or to be regarded as obsolete, has not been very distinctly avowed by those who demand the admission of members from those States.

46, 242.

What may
be the effect
of the third
section upon
the test
oath?

242.

285. It may not be out of place to observe, that, as the third section disqualifies a class from office, the principle of *inclusio unius, exclusio alterius*, may remove the disability caused by the test oath as to all not in that section enumerated. If this be so, those engaged in the late rebellion would gain rather than lose by the adoption of the amendment. Many leaders in that movement are not disqualified.

The question of what are the constitutional rights of men, regard- Rights.
less of the past, is always one of serious import. Such an issue, at
such a time, is well calculated to awaken the most painful appre-
hensions. The issues involved are:—1. Does freedom to the slave What are
mean equal liberty to the citizen? 2. Have they been made citi- the real
zens, and if so, what is the extent of their rights? 3. Shall the issues
governments of the States lately in rebellion be left to those only involved?
who controlled it; or shall all participate regardless of color or pre- 220, 274.
vious condition? 4. Shall the ratio of representation remain, thus 23, 24.
superadding two-fifths to the slave States without one-half of the
citizens having any greater participation in the government than
the slaves had; or shall the ratio be changed so as to represent
votes as well as numbers? 5. Shall any one for the past or the
future be disqualified from holding office because of participation in
insurrection or rebellion against the United States? 6. Shall there
be an organic guaranty in respect to the national debt; or shall
there be such guaranty against the rebel debt and the claim for
slaves?

See Farrar upon the Fourteenth Amendment, § 448, 449.

As to the speculative question, What is to be the future of
the negroes? an opinion would be as hazardous as would have been
an uninspired prophecy as to the future of the Jews the day they
crossed the Red Sea.

286. The editor of the foregoing notes cannot dismiss the sub- 1-278.
ject without a few general remarks, which have suggested them- What are
selves during the years of study necessary to the preparation of the general
such a work. These reflections will be confined to the changes in reflections
the organism of the government, silent and conventional. The of the
first reflection is, that in the choice of President the expectations editor?
of the framers of the Constitution have been disappointed. The What as to
choice was intended to be left to the electoral colleges uninfluenced the choice
by a previous canvass. It was probably expected that a failure President
to agree would be the rule—not the exception—and that the choice 167.
would devolve upon the House, and be made by States as co-equals.
The first disagreement led to a change of principle. The conven-
tion system of nominations has destroyed the influence of the
small States, and transferred the selection of candidates to the large
States. The contest is really directly for the candidates, and the
electors are but *conduit* pipes, fearfully responsible to their direct
constituents to whom they stand pledged.

The next noticeable fact has been the increase, and now the cur- 184-186.
tailment, of the President's power and patronage. The appointing
to office was always a prerogative of the crown. The power to
remove officers at pleasure, at first doubtfully exercised, has become
a fearful engine of party. The tenure-of-office law has attempted 184.
to check the exercise of the power without reaching the root of the
evil. But the mischief lies not so much in the constitutional powers
of the President, as the too common error that the administration
is the government. Upon this fallacy of not living "under Lincoln
rule," the Southern heart was fired unto resistance and civil war;
the same popular fallacy has controlled in the same section in the
contest between the President and Congress. So that whether the President?

Magistrates. executive sympathies are against or for us, we overrate his powers for evil or good. Like all other magistrates, the President is obliged to be controlled by the Constitution and the laws of the land.

What of the judicial power? 195, 275. The third noticeable fact is, that the judicial jurisdiction and influence have been rather increased and enlarged than diminished. The reports of this branch of the government stand as vast monuments of learning. They are more permanently and generally accessible to the people than the expositions of the other departments. In a country where the legal profession exert so mighty an influence, they are regarded as more authoritative than other precedents, because the exact demarcations of judicial power are not clearly understood.

What revolutions have marked the history of the government? 229-232. The revolutions which have marked the history of the government will be found in the several constitutional amendments, in the acquisition of foreign territory, the annexation of Texas, the history of the rebellion and the consequences which have followed. The acquisition of territory led to the creation of "colonial governments," or "inchoate States" (generally confused under the undefined title of "Territories"), and a series of legislation for which no direct constitutional grant could be found; and which consequently caused a rapid concentration of central power. Each new revolutionary fact has excused an exercise of the supposed "necessary and proper" legislation. These were incidents of national sovereignty which, perforce, revolutionized the public ideas of the country. The same may be said of the practical necessity which crushed the theory of secession. Sundry express powers were specially granted in the Constitution. To protect and shield these for the benefit of the whole people, all of the incidental necessary powers had to be exerted. And, in such a contest, the leading actors can never nicely discriminate. So that if it should become necessary to revolutionize States or change State boundaries and organizations, for safety, hereafter, we have the living precedents.

188. And yet the candid student must admit that our Constitution and Union still stand as the same glorious fabric, with the powers of departments clearly defined; with whole bills of rights unimpaired; with new guaranties for liberty; with human slavery stricken out of the instrument; and with a continuing struggle to protect the political equality of all. The nation is mighty and glorious among the great powers of the earth, and may it be perpetual. If I shall have contributed any thing to the study of this great fabric, my prayers will have been answered.

188. 233-235.

GEO. W PASCHAL

JAN. 1, 1868.

ARTICLE XV.

SEC. 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State, on account of race, color, or previous condition of servitude.

What is the rule as to suffrage?

SEC. 2. The Congress shall have power to enforce this article by appropriate legislation.

287. The following proclamation, which was communicated to Congress in a message of the President on the 30th March, 1870, gives the best history of the subject:—

On what day was the fifteenth amendment proclaimed?

And further, that it appears, from official documents on file in this department, that the amendment to the Constitution of the United States, proposed as aforesaid, has been ratified by the legislatures of the States of North Carolina, West Virginia, Massachusetts, Wisconsin, Maine, Louisiana, Michigan, South Carolina, Pennsylvania, Arkansas, Connecticut, Florida, Illinois, Indiana, New York, New Hampshire, Nevada, Vermont, Virginia, Alabama, Missouri, Mississippi, Ohio, Iowa, Kansas, Minnesota, Rhode Island, Nebraska, and Texas; in all, twenty-nine States;

And further that the States whose legislatures have so ratified the said proposed amendment constitute three-fourths of the whole number of States in the United States;

And further, that it appears, from an official document on file in this department, that the legislature of the State of New York has since passed resolutions claiming to withdraw the said ratification of the said amendment, which had been made by the legislature of that State, and of which official notice had been filed in this department;

And further, that it appears, from an official document on file in this department, that the legislature of Georgia has by resolution ratified the said proposed amendment;

Now, therefore, be it known that I, Hamilton Fish, Secretary of State of the United States, by virtue and in pursuance of the second section of the act of Congress, approved the twentieth day of April, in the year eighteen hundred and eighteen, entitled "An act to provide for the publication of the laws of the United States, and for other purposes," do hereby certify that the amendment aforesaid has become valid, to all intents and purposes, as part of the Constitution of the United States.

In testimony whereof, I have hereunto set my hand and caused the seal of the Department of State to be affixed. Done at the city of Washington this thirtieth day of March, in the year of our Lord one thousand eight hundred and seventy, and of the independence of the United States the ninety-fourth.

[L. S.]

HAMILTON FISH.

In what
order did the
States
ratify?

The States ratified in the following order: 1869, Kansas, Feb'y 27; Missouri, March 1; Nevada, March 1; West Virginia, March 3; Illinois, March 5; Louisiana, March 5; North Carolina, March 5; Michigan, March 8; Wisconsin, March 9; Massachusetts, March 9 and 12; Maine, March 12; South Carolina, March 16; New York, March 17 and April 14; Pennsylvania, March 17 and 26; Arkansas, March 17 and 30; Indiana, May 13 and 14; Connecticut, May 19; Florida, June 15; New Hampshire, July 7; Virginia, October 8; Vermont, October 21; Alabama, November 16. 1870, Minnesota, January 14; Mississippi, January 15; Rhode Island, January 18; Ohio, January 14 and 20; Iowa, January 19 and 20; Georgia, February 2; Texas, February 14; Nebraska, February 17.

The States which did not ratify are: California, Delaware, Kentucky, Maryland, New Jersey, Oregon.

Appendix.

CONSTITUTION

OF THE

UNITED STATES OF AMERICA.

To give a clear understanding, without the necessity of cross-references, it has been thought necessary to reprint the Constitution as it is enrolled in the State Department. The superior ⁽⁹⁾ figures denote what are usually called the enumerated powers. Particular attention is called to the marginal figures, which refer back to other expositions of the same articles. Of course no one will rely upon the Appendix without comparing it with the original text.

Direction
to the
reader.

288. DEFINED. The powers of government are, (1) those which belong exclusively to the States; (2) those which belong exclusively to the National Government; (3) those which may be exercised concurrently and independently by both; (4) those which may be exercised by the States until Congress acts upon the subject. In this last case the power of the State retires and lies in abeyance until the occasion for its exercise shall recur. *Ex parte McNeil*, 13 Wall., 240; *Railroad Company v. Fuller*, 17 Wall., 568.

What are
the powers
of the Gov-
ernment
exclusive
and concur-
rent?
2-4.

289. THE GOVERNMENT. Soon after the nullification ordinance of South Carolina in 1832, there was a convention in Georgia which passed the following resolutions, which long embodied the extreme views of those who afterwards became secessionists:

What was
the ex-
treme
States'
rights plat-
form in
Georgia?

"1. That the Federal Government is a confederacy formed by the States composing the same, for the specific purposes expressed in the Constitution, and for those alone.

"2. That every exercise by the Federal Government, or by any department thereof, of the powers not granted by the Constitution, notwithstanding it may be under the forms of law, is, in relation to the constituent States, a mere usurpation.

State sovereignty.

"3. That a government of limited powers can have no constitutional right to judge, in the last resort, of its own abuses of the powers conferred upon it, since that would be to substitute for the limitations of the constitutional charter the judgment of the agents who were employed to carry it into effect—to annihilate those limitations by a power derived from the same instrument which created them.

Limited powers.
269.

"4. That the Federal Government is a government the powers of which are expressly limited in the Constitution which created it, and can therefore have no constitutional right to judge in the last resort of the use or abuse of those powers.

States to judge of infractions.

"5. That it is essential to a confederated government, the powers of which are expressly limited by the Constitution which creates it, that there should exist somewhere a power authoritatively to interpret that instrument, to decide in the last resort on the use or abuse of the authority which it confers upon the common agent of the confederating States; that such a power cannot belong to the agent, since that would be to substitute his judgment for the constitutional limitation; and that, in the absence of a common arbiter, expressly designated by the Constitution for this purpose, each State, as such, for itself, and in virtue of its sovereignty, is necessarily remitted to the exercise of that right.

States were sovereign.

"6. That the several States composing the Union were, at the adoption of the Federal Constitution, free, sovereign, and independent States; that they have not divested themselves of this character by the relinquishment of certain powers to the Federal Government—having associated with their sister States for purposes entirely compatible with the continued existence of their own original freedom, sovereignty, and independence." (Resolutions of the Nullification Convention of Georgia in November, 1832; Bench and Bar of Georgia, 37. And see Calhoun's Resolutions in the Senate, 1833.)

Remarks.

These resolutions were but an improvement upon, and a little less extreme than, the nullification ordinance and doctrines of South Carolina of the preceding and that year, and which assumed all the powers claimed in the Georgia resolutions, and distinctly claimed the right of a State to meet in convention and veto or arrest the operation of an act of Congress in a State until the meeting of the States in a national convention. They all claimed to have their origin in the Virginia and Kentucky resolutions of 1798, 1799. The whole first volume of Alexander H. Stephens's "War Among the States" is an effort to maintain the theory that the first struggle arose out of the contest between the supporters of a strictly federative and thoroughly constitutional government, and those of a central national government. It proceeds upon the idea that the Constitution was made by States and for States, and not a political union between the people of the several States, except such as resulted

What are the teachings of Stephens's "War among the States?"

indirectly from the terms of agreement or compact between the States; and that these States acted as sovereigns, and remained sovereign, and as a sequence each State could determine for itself its longer relations to the Union. The book is full of history and ingenious argument, and will of course always be consulted by the admirers of that school. But, to say the least, one great fault of the argument is, that the right of a State to judge for itself as to infractions of the Constitution and the mode and measure of redress, must concede that every other State has the same right to judge for itself, and to meet forcible resistance to the execution of a law passed by the representatives of all. And as every State is represented in the Federal Government, so long as a quorum in Congress favors the enforcement of the law, the argument resolves itself into one of power. And again, every individual in every State and Territory has certain guaranteed rights, and certain responsibilities to every other State to which he has the right to go, and to trade without other burdens than those imposed upon other citizens, and against which he may commit treason, without being a citizen thereof; so that every citizen of the United States not only owes allegiance to the Federal Government, to his own State, but to every other State as well. And in turn, every citizen is entitled to all the protection, privileges, and immunities of the citizens of each State in such State, and of the National Government everywhere. An argument more potent against the doctrine of peaceable secession is that it has been tried by the majorities of the people of eleven States, and, after a brave struggle, it signally failed.

State sovereignty?

What are the objections to this?

P. 222, notes 220, 221.

290. HISTORY. The idea of creating a government which should not act upon the States, but upon individuals, and vest in Congress full power to carry its laws into effect, is claimed to have originated with Noah Webster, in a pamphlet published by him in 1784-'85, entitled "Sketches of American Policy," a copy of which was carried by the author to General Washington, at Mount Vernon. It thus appears that the idea of a self-executing government was conceived and discussed long before the assembling of the Convention. (Webster's Dictionary, Unabridged, Preface, p. xviii.)

Who is said to have originated the idea of creating a government to act upon the people?

Jefferson had a clear conception of a government for foreign concerns, modeled on the same plan as a State government, with legislative, executive, and judicial powers. (Letter to Madison, 16 Dec. 1786, 2 Jefferson's Complete Works, 66.)

State some of the sources of information?

The first act of the Convention was to resolve "that a National Government ought to be established, consisting of a supreme judicial, legislative, and executive." 1 Elliott's Debates, 391, 392; 2 Madison's Papers, 747. The resolution was one of three offered by Gouverneur Morris. The first was against the plan of the then existing confederation; the second was against mere treaties among the States as sov-

Supreme? eigns. The word "supreme" was explained not to be intended to annihilate the States, only so far as the powers should clash with the new government. War Between the States, 121-123; Story's Constitution, book iii, ch. vii, § 518.

Twenty-one days afterwards Ellsworth's resolution was passed, which substituted "The United States" for "National." 1 Elliott's Debates, 183.

Sources of information?

For the responses of the States to the call for a convention to revise the Articles of Confederation, see 1 Elliott's Debates, 126-138; Hickey's Constitution, pp. 129-192.

All the resolutions are given in Stephens's War Among the States, 96-117. The same author also gives the debate between Webster and Calhoun in the Senate, (1833,) wherein will be found all that can be said against and for the Constitution being a compact rather than a government. And see Calhoun's resolutions upon the theory of the Government, Congressional Globe, Appendix, 2d session, 25th Cong., p. 98; same resolutions, 1 War Among the States, 401.

What theory does the author suggest?

While mere theories are valueless against experience, and the one great precedent, the editor feels obliged to state, as his own theory, a view which he does not remember to have seen elsewhere. When this Constitution was proposed, the States had constitutions under which they claimed independence, subject only to the common union, which originated in the necessities of the common cause, and was formulated in the Articles of Confederation. By ratifying this Constitution, the people of the States agreed that it should be engrafted upon the several State constitutions, present and future. And this being supreme, so far as it speaks distinctly and by necessary implication, the State constitutions are silent, anything therein to the contrary notwithstanding.

252.

It follows, therefore, that while any State may change its own constitution at pleasure, all such changes are subject to the still paramount Constitution of the United States, that can only be changed, abridged, or amended in one of the modes provided in the instrument itself. The application given to the amendments, in holding that such amendments have no control upon the States, would seem to antagonize this theory. But this narrow view was doubtless taken because of slavery; and it has been followed because of the deference paid to precedents. If in truth the Constitution of the United States and all its amendments be engrafted upon the State constitutions, and as far as the former speak they control the latter, there ought to be little difficulty in keeping the line of demarkation between the two governments.

Repeat the preamble, page 53, notes 5-13.

WE, THE PEOPLE OF THE UNITED STATES, in order to form a more perfect Union, establish Justice, insure domestic Tranquillity, provide for the common De-

fence, promote the general Welfare; and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this CONSTITUTION for the United States of America.

291. For criticisms on this preamble, see *War Among the States*, 140-145.

“WE, THE PEOPLE OF THE UNITED STATES.” This means those States which had before dissolved their political bands with Great Britain, and the same designation of the Government is found in the Articles of Confederation; and all who were then people of those States became citizens and members of the nation created by the adoption of this Confederation. Such were original citizens of the United States under the Constitution. *Minor v. Happersett*, 21 Wall., 166, 167. Define “We the people.” 6.

The term is not applicable to the condition of the States as they exist under the Constitution, but as it was under the old Confederation, before its adoption. Calhoun’s answer to Webster, 1833, 1 *War Among the States*, 360.

The people of the United States constitute one nation, under one government, and this government, within the scope of the powers with which it is invested, is supreme. On the other hand, the people of each State compose a State, having its own government, and endowed with all the functions essential to an independent and separate existence. The States disunited might continue to exist. Without the States in union, there could be no such political body as the United States. Chief Justice Chase, in *Lane County v. Oregon*, 7 Wall., 76; repeated, *Texas v. White*, 7 Wall., 719; S. C., 25 Tex. Supp., 596. Do they constitute one nation? 294.

292. “IN ORDER TO FORM A MORE PERFECT UNION.” The union of the States never was a purely artificial and arbitrary relation. It began among the colonies, and grew out of the common origin, mental sympathies, kindred principles, similar interests, and geographical relations. It was strengthened and received definite form by the Articles of Confederation, by which the union was declared “to be perpetual.” And when these articles were found to be inadequate, the Constitution was ordained to form a more perfect union. *Texas v. White*, 7 Wall., 721; S. C., 25 Tex. Supp., 599. Under the Articles of Confederation, each State retained its sovereignty, freedom, and independence, and every power, jurisdiction, and right not expressly delegated to the United States. Under the Constitution, though the powers of the States were much restricted, still all powers not delegated to the United States nor prohibited to the States are Define a more perfect Union. 7.

Art. X, n.
269.

reserved to the States respectively or to the people. And "the people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence," and "without the States in union, there could be no such political body as the United States." (*Lane County v. Oregon*, 7 Wall., 96.) Not only, therefore, can there be no loss of separate and independent autonomy to the States through their union under the Constitution, but the preservation of the States and the maintenance of their governments are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government. The Constitution, in all its provisions, looks to an indestructible union, composed of indestructible States. The obligations of the State as a member of the Union, and of every citizen of the State as a citizen of the United States, after secession remained perfect and unimpaired. It certainly follows that the State did not cease to be a State, nor its citizens to be citizens of the Union. *Texas v. White*, 7 Wall., 725; S. C., 25 Tex. Supp., 600.

Is the Union
indissoluble?

When Texas became one of the United States, it entered into an indissoluble relation. The union between Texas and the other States was as complete, as perpetual, and as indissoluble as the union between the original States. There was no place for reconsideration or revocation, except through revolution or through the consent of the States.

Considered as transactions under the Constitution, the ordinance of secession adopted by the convention, and ratified by a majority of the citizens of Texas, and all the acts of its legislature intended to give effect to that ordinance, were absolutely null. They were utterly without operation in law. The State did not cease to be a State, nor its citizens to be citizens of the Union. (*Paschal's Digest*, 78.) *Texas v. White*, 7 Wall., 701; S. C., 25 Tex. Supp., 466. And see Chief Justice Chase in *Shortridge's case*, quoted and approved in the *Sequestration Cases*, 30 Tex., 708.

Define "To
establish
justice?"
8.

293. "ESTABLISH JUSTICE." One of the means of establishing justice was to prohibit any State from passing any law impairing the obligation of contracts.

What is justice is not left in doubt as to contracts. There was a simultaneous ordinance by the Congress of the Confederation for the government northwest of the Ohio. One of the objects was "for the purpose of extending the fundamental principles of civil and religious liberty, whereon these republics, their laws and constitutions, are erected." And while Congress may enact bankrupt laws which impair contracts, and may incidentally impair them by laws passed in the execution of an express power, yet if enacted not in aid of an express power, and in its direct operation the law impairs the obligation of contracts, it would be inconsistent with

the spirit of the Constitution. Chief Justice Chase in *Hepburn v. Griswold*, 8 Wall., 622, 624. This seems to be a strained application of a familiar principle. The impairment of contracts can hardly be said to enter fairly into the discussion of the legal-tender question. Congress is not prohibited from passing laws which incidentally or directly impair the obligation of contracts. *Legal-Tender Cases*, 12 Wall., 547-549. The words doubtless had reference to the distribution of judicial power in the manner prescribed by the judiciary act of 1789 and the several amendments of 1866, 1867, and 1875, relative to the transfer of causes.

P. 112, n. 93, 94.

294. "SECURE DOMESTIC TRANQUILLITY." This is fully defined in note 10. The exercise of judicial power in controversies between States has been a potent means of preserving domestic tranquillity. *Ableman v. Booth*, 21. How., 506.

How has domestic tranquillity been preserved?

295. "PROVIDE FOR THE COMMON DEFENCE." See note 10. The legislation which bears upon this power is collected in the Revised Statutes. Sections 214-232, 1094-1242.

296. "PROMOTE THE GENERAL WELFARE." Should any of the States interpose formidable obstacles to the free movement of the commerce of the country, so as to impede the passage of produce, merchandise, or travel from one part of the country to another, the case would not be a *casus omissus* in the Constitution. Commercially this is but one country, and intercourse between all its parts should be as free as due compensation to the carrier interest will allow. *Railroad Company v. Maryland*, 21 Wall., 474.

Give an example of the general welfare. 11, 289.

ARTICLE I.

SECTION 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

In what is the legislative power vested? P. 58, notes 14, 15.

297. The judicial department cannot prescribe to the legislative limitations upon the exercise of its power to tax. *Veazie Bank v. Fenno*, 8 Wall., 548.

Can the judicial department limit the legislation of Define "the House of Representatives." Page 58, notes 16-18.

SECTION 2. ¹The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

What is the object of elections?

298. "MEMBERS CHOSEN EVERY SECOND YEAR BY THE PEOPLE OF THE SEVERAL STATES." The object of this is to establish the body of electors, and not to prescribe the manner of choice. (See the question argued, report of Garrett Davis on the general ticket question, 1842-'43. Contested Elections, 57.)

What of Mexicans and Indians?

The Mexicans who, by written declaration, elected to retain their Mexican citizenship under the treaty of Guadalupe Hidalgo were not citizens of the United States, entitled to vote in New Mexico. Nor were the Indians of that territory, who remained in their tribal relations. *Otero v. Gallegos*, 3 Contested Elections, 177.

What is the power of the State over the qualifications of electors?

299. "QUALIFICATIONS REQUISITE FOR ELECTORS." The elective officers of the United States are all chosen by the people of the States; and at the time of the adoption of this Constitution the qualifications were various, as will be seen in this opinion, and it was not intended by the Constitution to take from the States the right of determining who should be qualified electors. *Minor v. Happersett*, 21 Wall., 172, 173.

What effect has the fifteenth amendment upon suffrage? P. 50.

The fifteenth amendment, being the supreme law, in effect has erased the word "*white*," as a requisite for suffrage, out of the constitutions of the States; and although there still exists want of uniformity in the qualifications for suffrage, there no longer remains a distinction founded upon color. Neither the fourteenth nor fifteenth amendments intended to take from the States the right to determine who shall vote. The power to discriminate as to color is denied. So a deduction from representation for any other cause than rebellion or crime lessens the numbers to be computed in the basis of representation. But the amendments confer no absolute right of suffrage. *Minor v. Happersett*, 21 Wall., 174. *Anthony v. The United States*, Justice Hunt, 18 June, 1874. Subject to the limitations in the fifteenth amendment, the power to fix the qualifications of voters remains in the States *Huber v. Riley*, 53 Penn. St. R., 115; *Ridley v. Sherbrook*, 3 Cold., 569; *Anderson v. Baker*, 2 Md., 531; *Brightley's Election Cases*, 27; *American Law of Elections*, by MCRARY, § 13. The usual qualifications, as will be seen in note 16, are citizenship, residence, majority, male sex; and the disqualifications in some States are non-payment of taxes, non-registration, infancy, idiocy, and lunacy. The Legislature cannot create a disqualification not found in the Constitution. *McCafferty v. Geiger*, 59 Penn. St. R., 109; *Brightley's Election Cases*, 44; *American Election Cases*, 10. To the States which allow aliens who have declared their intention to become citizens to vote may be added South Carolina, Texas, and others of the reconstructed States. But it has not been thought worth while to classify the qualifications again.

²No Person shall be a Representative who shall not have attained to the Age of twenty-five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

What are qualifications of representation? Page 66, notes 19, 20.

300. "NO PERSON SHALL BE A REPRESENTATIVE," &c. The States can no more prescribe new qualifications for a representative than they can for President. (1 Kent, 228, note, *f*; 2 Story on the Const., pp. 99-103.) *Turney v. Marshall*, and *Fouke v. Turnbull*, 3 Contested Elections, 167, 168. It is a fair presumption that when the Constitution prescribed the qualifications it intended to exclude all others. It would take away from the people of the States the right to choose. Ho. Reps., June, 1868; Bingham's Speech, 32 Globe, part 2, p. 830.

Can the States add to the qualifications?

301. "AND WHO SHALL NOT, WHEN ELECTED, BE AN INHABITANT OF THE STATE IN WHICH HE SHALL BE CHOSEN." An inhabitant is a *bona fide* member of the State, subject to all the requisitions of its laws and entitled to all the privileges which they may confer. *Bailey's Case*, Contested Election Cases, 411; *Pigott's Case*, 14 February, 1863, 3 Contested Elections, 463, 464; 47 Congressional Globe, 1210, 1211.

Define "inhabitant."

Pigott had resided in the District of Columbia eleven or twelve years, owned real estate there, and had voted there, and had only returned to North Carolina as the secretary of the military governor, Stanley. But see the case of Senator Ames, elected Senator from Mississippi, where he had never resided, except as commanding general.

Give an example. 20.

³Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three-fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Represent-

Give the rule of representation, as changed by the fifteenth amendment? Pp. 48, 279, 21-24. P. 67, notes 22-24.

Thirty
thousand.

atives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such Enumeration shall be made the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

Has this
clause been
superseded?
P 279.

302. "REPRESENTATIVES AND DIRECT TAXES SHALL BE APPORTIONED AMONG THE SEVERAL STATES." Were not the words "and direct taxes" carefully or carelessly omitted out of the first line of section 2, article XIV, I should say that those down to the first period are superseded by that section. Certainly the basis of apportionment is wholly changed. And as to direct taxes, the numbers have to be calculated by the apportionment under the amendment. It is notable that under that amendment representation is based upon voters as well as numbers. If the familiar rule of construction be invoked which was applied in *Murdock v. Memphis*, 20 Wall., 617; *United States v. Tyner*, 11 Wall., 88; *Henderson v. Tobacco*, Ib., 652; *Bartlett v. King*, 12 Mass., 537; *Cincinnati v. Cody*, 10 Pick., 36; *Sedgwick on Stats.*, 126; then all to the first period is repealed by the second section of the fourteenth amendment, thus excluding the words "DIRECT TAXES." All after the words "ACTUAL ENUMERATION" has expired by having been fulfilled, except it be the obligation to enumerate "EVERY TEN YEARS," and the inhibition against a less representation than "ONE FOR EVERY THIRTY THOUSAND." And by the canons of statutory construction, these exceptions might be regarded as superseded, and the whole clause no longer of force. But see art IV, sec. 9, cl. 4.

22, 72, 77,
144.

If Congress see fit to impose a capitation or other direct tax, it must be laid in proportion to the census; if to impose duties, imposts, and excises, they must be uniform throughout the United States. These are not limitations, but rules showing how the power shall be exercised. *Veazie Bank v. Fenno*, 8 Wall., 541.

Define "direct taxes."

303. "AND DIRECT TAXES." Adam Smith does not define direct taxes. We have to resort to acts of Congress for definitions. In each of the acts for the collection of direct taxes, a gross sum was laid upon the United States, and the total amount was apportioned to the several States, according to the respective numbers of the inhabitants, as ascertained by the last preceding census.

22.

Having been apportioned, provision was made for the imposition of the tax upon the subject specified in the act, fixing its total sum. Personal property, contracts, occupations, and the like have never been regarded by Congress as the subjects of direct tax. (Acts of 14 December, 1798, 1 St., 597; 2 August, 1813, 3 St., 53; 9 July, 1815, 3 St., 164; 5 March, 1816, 3 St., 255; 5 August, 1861, 12 St., 294.) *Veazie Bank v. Fenno*, 8 Wall., 541-543. Give a history.

These acts respectively imposed two, three, six, (changed to three,) million dollars. No other direct tax was laid until the act of 5 August, 1861, (12 St., 294,) when a direct tax of twenty million dollars was laid and collected annually, but it was suspended after the first year. The subjects were land, improvements, dwelling-houses, and slaves.

Slaves were either the subject of capitation tax or were taxed as realty. *Veazie Bank v. Fenno*, 8 Wall., 543, 549.

Direct taxes have been limited to taxes on land and appurtenances, and taxes on polls or capitation taxes. (3 Madison Papers, 1387; *Hylton v. United States*, 3 Dallas, 171, in which all agreed that a tax on carriages was not a direct tax.) A tax upon the circulation of State banks is not a direct tax, but is in the nature of a tax upon incomes of insurance companies, which has been held not to be a direct tax. (*Pacific Insurance Company v. Soule*, 7 Wall., 434.) Such a tax is not upon the franchise of the bank, which might be taxed, but upon the property created on contracts made and issued under the franchise. *Veazie Bank v. Fenno*, 8 Wall., 545, 547. Upon what have direct taxes been laid?

304. "SHALL BE APPORTIONED." See the General Ticket case, 1 Contested Election Cases, 47. This clause furnishes the *principle* and *manner* of every apportionment of representation. The manner of making the enumeration is confided to Congress, but the manner of making the apportionment is not. The apportionment must be made to each of the several States, the admission and right to representation, of which Congress may determine. But the apportionment must be based on numbers of the federal populations, and it must be to each one of the several States of the Union. By that event, (emancipation,) if the census of 1860 is to be our guide, 3,950,431 of the people of the republic were changed from being slaves to citizens, and by that change 1,580,212 "persons" were added to the representative population of the republic. This event has such magnitude as that, if an apportionment is to be now made based on *it*, that apportionment will reduce the aggregate representation from the free States from 156, as it now is, to 147 members, thus depriving them of nine members of the House; this by adhering to the ratio of representation upon which the membership of this House is elected, namely, 127,000; and it will increase the aggregate representation from the late slave Define "apportioned."

Cases. States from 85 to 94 members. Hamilton's Case, 40th Cong. 3d session, Ho. Reps. Rep. 38.

Define
"among the
several
States."

23, 304.

305. "AMONG THESE SEVERAL STATES." The Congress, by other provisions of the Constitution, has the power to determine when a territory or people are in such numbers, or in organization, or in attachment to the Government of the United States, as to be fit or entitled to be admitted as one of "the several States included in the Union." But being so admitted and recognized by Congress as such State, the Congress has no discretion as to the apportionment to such State of representation, but must accord representation to *each* State so admitted and recognized by Congress. Hamilton's Case, Ho. Reps. Rep. No. 37, 40th Cong., 3d session.

This principle, expressed by a committee and acted upon by the House, is in accordance with the ground taken by the 38th, 39th, 40th, and 41st Congresses, in determining that the eleven States which had engaged in the rebellion were not entitled to representation until they had fully complied with the reconstruction laws, did not deny the existence of the States among which representation had already been apportioned. Indeed, the whole action of the President and Congress, although widely differing, proceeded upon the theory that while these were "States included in the Union" for many purposes, yet having voluntarily surrendered their representation in Congress, the Government, either the President or Congress, or the appropriate number of States, by constitutional amendments, might determine when they should be readmitted to representation. *Texas v. White*, 7 Wall., 700; S. C., 25 Tex. Supp., 465.

To what are
numbers
confined?

303.

306. "WHICH MAY BE INCLUDED WITHIN THIS UNION." There is no provision for representation from a *Territory*, or from any but the "STATES." It has been the universal custom, however, to grant to the people of the Territories this privilege, and no territorial government has been organized without it. It is a custom so well established as almost to have assumed the force of law. *Sibley's Case*, 3 Contested Elections, 101. This right was secured by the ordinance of 13th July, 1787, and it cannot be denied. *Id.*, 105. But this was a right older than the Constitution, and was secured by the ordinance of the Confederation. The delegate was given the privilege of debating, though not of voting. That ordinance was reaffirmed by an act of Congress under the Constitution, and the delegate permitted to hold his seat. This has served as a precedent for all the other territorial organizations. *Smith's Case*, (from New Mexico,) 3 Contested Elections, 107, 109; *Babbitt's Case*, (from Deseret,) *Id.*, 117; *Messevy's Case*, (from New Mexico,) *Id.*, 150.

What are
the rights
of dele-
gates from
the Terri-
tories?
P. 235, notes
229, 230.

But in every such case the delegate has been chosen under the laws of Congress, and from a government subordinate

to and emanating from the Constitution and laws of the United States. *Messey's Case*, 3 Contested Elections, 150. And although New Mexico was one of the organized Mexican territories, yet it did not remain such after its transfer to the United States, and a delegate to Congress informally chosen by those people was not entitled to a seat as a delegate from a Territory. *Smith's Case*, 3 Contested Elections, 108, 110. *Sibley's Case* was based upon the position that the territorial government of Wisconsin was not merged in the State government formed out of a part of that territory. *Id.*, 110, 117.

The question was debated with reference to the destruction of the Mexican territorial organization by the transfer, and as to the right of Texas over that territory, and Smith was denied his seat. 3 Contested Elections, (1849.) pp. 107-116. See *Congressional Globe*, vol. 21, part 2, pp. 1038-1411.

Babbitt's Case, who came from the state of Deseret, was one of peculiar interest; but it only settled the principle that where there was no regular territorial organization, the member would not be admitted. 2 Contested Elections, 116.

In *Messey's case*, the people of New Mexico had organized a State government, and elected senators and representatives; but it was action without a preceding enabling act, and in the absence of the existence of a territorial organization.

In some instances the law has provided that the delegate should be elected by the territorial legislature; in others by the people included under the government. But in every case the delegate admitted has been chosen by laws previously enacted by Congress. See act of 1817, *Messey's case*, Contested Elections, 151.

In the great Kansas controversy, Congress went behind the territorial laws, and allowed proof of the revolutionary, violent, and fraudulent manner in which these laws were enacted, and decided that the territorial laws were nullities, and that the delegate was elected without authority of law. *Reeder v. Whitfield*, 5 March, 1856, 3 Contested Election Cases, 185. The debate will be found in the 32d and 33d volumes of the *Globe*. As to irregularities and powers, see the *Nebraska case*, *Bennett v. Chapman*, 18 April, 1856, 3 Contested Elections, 204.

307. "ACCORDING TO THEIR RESPECTIVE NUMBERS." What effect had the destruction of slavery upon numbers? The increase of representative numbers by the destruction of slavery in Tennessee did not entitle that State, or any other slave State, to a new apportionment and a corresponding increase of representatives. *Hamilton's Case*, 40th Cong., 3d session, Report No. 28.

308. "THE ACTUAL ENUMERATION SHALL BE MADE, What were

intended
by refer-
ence to the
census?
24.

* * AND WITHIN EVERY SUBSEQUENT TERM OF TEN YEARS." These precedents involve and sustain the following propositions, namely:

1. That "the Constitution evidently contemplated a census *only once* in ten years, and consequently a new apportionment, based upon such census, *only once* in ten years."

2. "The census and apportionment, thus connected together in the Constitution, have been connected together in all subsequent legislation of Congress."

3. "There can be no such thing as one State represented according to one apportionment and under one census, and another State according to some other apportionment based on another census. The whole number of representatives and the number for each State are both fixed by law, and by the same law. There cannot be one law for one State and another law for another." See *Lowe's Case*, 1862, *Contested Elections*, 421, 423, approved by the House without division.

4. All former special acts of apportionment have been passed, at least professedly, to supplement the acts of general apportionment, and to complete the equality of that apportionment to and among each and every one of the several States; and no act was ever passed which contemplated or recognized any other State as being left without its just proportion of representation, as contrasted with what was accorded by the special and the general law to every other State. *Hamilton's Case*, Ho. Reps. Rep. 28, 40th Cong., 3d session. *Lowe's case* contained a full review of the statutes about the census, and settles that the law of 1860 did not take effect until 4 March, 1863. 3 *Contested Elections*, 418-424.

How are
vacancies
filled?
P. 72, note
25.

* When Vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

Define
"happen."
185, 186.

309. The word "HAPPEN" is not necessarily confined to fortuitous or unforeseen events, but is equally applicable to all events which, by any means, occur or come to pass, whether foreseen or not. It is equivalent to the word *exist*. *Gholson and Claiborne's Case*, *Contested Election Cases*, 9, 25th Cong., 3d session, 25 September, 1837. But this view, although concurred in, was not maintained. President Van Buren convened the 25th Congress in extraordinary session, to meet on the first Monday in September, 1837. The 24th Congress had expired on the 4th of March of that year, and the regular time for election in Mississippi was not until the first Monday in November thereafter. The Governor issued his proclamation for an election, (assuming that "a vacancy had occurred,") "to be held on the first Monday in July, to fill said *vacancy*, until superseded by the members to be

What was
the case of
Prentiss
and Word?

elected at the next regular election on the first Monday and day in November next." At this *special* election Samuel S. Gholson and F. H. Claiborne were chosen. They had been members of the 24th Congress, and their terms expired on the 4th of the preceding March. But for the extra session, there would have been no necessity for an election. The vacancy *happened* because of the failure of Mississippi to elect members to the 25th Congress before the 24th expired. Upon this state of facts, the House voted that Gholson and Claiborne were duly elected members of the 25th Congress—yeas 118, nays 101. This decision may be said to have been reversed. At the time prescribed by law (in November) a regular election was held, at which S. S. Prentiss and Thomas J. Word were chosen. Gholson and Claiborne, standing upon the decision of Congress, declined the canvass. With the Governor's certificate of election, Prentiss and Word now contested the seats of the sitting members. After full discussion, the House, on the 31st January, 1838, rescinded the previous resolution—yeas 119, nays 112. (Contested Election Cases, 15.) And on the 3d of February the House voted that Prentiss and Word were not entitled to their seats—yeas 118, nays 116. *Id.*, 16. For debates, see 5 Congressional Globe, 80, 82, 85, 88; same. Appendix 85, 91, 130, 223; 6 *Id.*, '56, 104, 119, 145, 146, 148, 150, 155, 158, and Appendix, 68, 93, 124, 127. A very full report of the case will also be found in the Life of S. S. Prentiss.

Regular and special elections.

The final action of the House in excluding Gholson and Claiborne is a correct precedent. A vacancy cannot be said to have *happened* when the time prescribed to elect members to a new Congress had not arrived, because no *seats* in that Congress had been actually or prospectively *filled* by members from Mississippi. The power to order the election did not exist in the Governor. It should have followed, as a logical sequence, that Prentiss and Word were entitled to their seats. But members voted upon purely political grounds, and it was one of those revolutionary exercises of power for which the democracy suffered severely in Mississippi for many years.

Can a vacancy happen before the seat has been filled?

⁵The House of Representatives shall chuse their Speaker and other Officers, and shall have the sole Power of Impeachment.

310. "THE HOUSE OF REPRESENTATIVES SHALL CHUSE THEIR SPEAKER AND OTHER OFFICERS." While the clerk of the former House presided, during the efforts to organize the House he only put questions, without the power to decide, or even to preserve order. These powers are conferred by rules 146, 147. Senator Sumner, 3 President's Trial, 293. The following is necessary to complete note 26, p. 73 :

Who chooses the Speaker and has the power of impeachment? Page 72, notes 26, 27.

Page 73.

SPEAKERS.

Name the late Speakers.

- 40 Schuyler Colfax, March 4, 1867, to March 3, 1869.
- 40 Theodore M. Pomeroy, for March 3, 1869, N. Y.
- 41 James G. Blaine, March 4, 1869; March 3, 1871, Maine.
- 42 James G. Blaine, March 4, 1871, March 3, 1873.
- 43 James G. Blaine, December 1, 1873, March 3, 1875.
- 44 Michael C. Kerr, December 6, 1875, Indiana.

How many Senators and how chosen. Page 74, notes 23-30.

SECTION 3. ¹The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.

What is a lawful legislature? Notes 332, 333.

311. "CHOSEN BY THE LEGISLATURE THEREOF." Within the last few years it has several times become a question of great import as to what is the Legislature of a State within the meaning of this clause. After secession and during the whole civil war, while the theory has been constantly maintained that the States remained States of the Union, (*Texas v. White*, 7 Wall., 700,) and although all the seceded States had Legislatures almost constantly in session, yet no one will pretend that, had these Legislatures elected Senators, such would have been received by the Senate, and thus allowed to oppose the measures which were resorted for the restoration of the Union. Such Legislatures did pass many laws which have been recognized as valid. But all those which were in violation of the Constitution and laws of the United States, or in aid of the rebellion, have been regarded as nullities. Upon the same, or even a higher principle, it must be conceded that elections by Legislatures thus constituted were not Legislatures having the right of election.

Johnson's mode of reconstruction.

After the close of the war, the President assumed the power of revolutionizing these State governments through the agencies of Provisional Governors and the instrumentalities of State constitutional conventions. These conventions recognized the destruction of slavery by the war power, and provided for the election of Legislatures which chose Senators. But these were generally refused admission. This must have been upon the principle of the invalidity of such Legislatures for the purpose of choosing Senators. Or we may have much history which we do not understand.

The Alabama case.

Without pausing to discuss these precedents, others have happened less reconcilable with principle. In Alabama two bodies organized, claiming to be rightful Legislatures. The Senate had to decide which should be recognized, and it admitted the Senator whose politics coincided with a majority of the Senate. In Louisiana the Legislature was organized and a Governor installed through the forcible influence of the army of the United States. A Senator was elected; and

that imposed the necessity of looking to the claims of the electing body to be a Legislature, as well as to the moral fitness of the party elected under the circumstances which he had helped to create. The question has not yet been settled.

Alabama and Louisiana.

A history of the Louisiana affair would be too long for this book. The editor would find in it no defense of constitutional liberty.

Mr. Sykes claims the seat now held by Hon. Geoger E. Spencer as Senator from the State of Alabama, upon the assertion that the body claiming to be the Legislature of that State which elected the said Spencer was not the rightful Legislature, but that another body of men was such Legislature; and that the latter body, on the 10th day of December, A. D. 1872, duly elected the said Sykes to be the Senator of the United States from that State for the term of six years, commencing on the 4th day of March, A. D. 1873.

Spencer's case.

It is a fact that there were two bodies, each claiming to be the Legislature of that State, and the question is, which of these two bodies ought to be considered the rightful Legislature at that time?

Validity.

"In the opinion of your committee it is not competent for the Senate to inquire as to the right of individual members to sit in a Legislature which is conceded to have a quorum in both houses of legally elected members. But, undoubtedly, the Senate must always inquire whether the body which pretended to elect a Senator was the Legislature of the State or not; because a Senator can only be elected by the Legislature of a State. In this case Spencer having been seated by the Senate, and being *prima facie* entitled to hold the seat, the Senate cannot oust him without going into an inquiry in regard to the right of the individual persons who claim to constitute the quorum in these respective bodies at the court-house and at the State-house. We cannot oust Spencer from his seat without inquiring and determining that the eight or nine individuals who were elected were not entitled to sit in the Legislature of the State, because they lacked the certificates. But if the Senate can inquire into this question at all, it must certainly inquire for the fact rather than the evidence of the fact. It cannot be maintained that when the Senate has been compelled to enter upon such an examination it is estopped by mere *prima facie* evidence of the fact, and the certificate is conceded to be nothing more than *prima facie* evidence. But the Senate must go back of that to the fact itself, and determine whether the persons claiming to hold seats were in fact elected. When we do this we come to the conceded fact that these persons, lacking the certificate, had in fact been elected, and that the persons who claimed to be the quorum of the two houses were in fact the persons who, in virtue of the election, were entitled to constitute the quorum of both houses." (Senate Report No. 291.)

When may the Senate inquire into the validity of the legislature?

Name Pinchback's case.

In the case of Pinchback, Mr. Morton reported that upon

Kellogg's
govern-
ment.

the certificate of election by Governor Kellogg, Mr. Pinchback has a *prima facie* title to admission as a member of the Senate, and that whatever objections may exist, if any, as to the manner of his election, or as to the legal character of the body by which he was elected, should be inquired into afterward. This was denied by the minority of the committee, who insisted that at the date of the certificate (15 January, 1873) William P. Kellogg was not Governor of Louisiana, neither *de jure* nor *de facto*, and for this they cited Henry v. Lisle, Andrew's Reports, 173; Plymouth v. Painter, 17 Conn., 588; People v. Collins, 7 Johns., 549. They insisted that at the date of the certificate there were two pretended governments in operation in the State of Louisiana, of which W. P. Kellogg claimed to be governor of one, and John McEnery governor of the other. There were also two legislative bodies, one of which elected Pinchback and the other W. L. McMillan. And the general argument was to prove that the Kellogg government was an usurpation supported by the military power of the United States, while that headed by McEnery was the rightful government. No decision was made between the contestants for the unexpired term to fill the vacancy of Kellogg. The contest has been over the long term, and down to this writing no decision has been made. The question imposes on the Senate the duty to determine whether the election was by a lawful Legislature of the State. (Senate Report, 626, part 2.) Pending the contest, the house of the Louisiana Legislature voted for Mr. Eustis in separate session. The senate, as a body, refused to vote. The two bodies met in general convention, and the house and four senators elected Mr. Eustis. Governor Kellogg refused to certify the fact as an election. Pinchback not entitled to a seat; 9 Feb., 1876.

Note 29.

How are
the Sena-
tors classi-
fied?
Page 76,
notes 31-34.

²Immediately after they shall be assembled, in Consequence of the first Election, they shall be divided, as equally as may be, into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one-third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

312. "AND IF VACANCIES HAPPEN." The Governor of Arkansas appointed Sevier, in contemplation of the vacancy which would exist after the expiration of his term, and the Senate sanctioned the appointment. Sevier's Case, 1837, 1 Contested Elections, 604. How do vacancies happen in the Senate? Note 307. 31.

The principle in Lanman's Case is that the Legislature of a State, by making elections themselves, shall provide for all vacancies which must occur at stated and known periods; and that the expiration of a regular term of service is not such a contingency as is embraced in this clause of the Constitution. Sevier's Case, Id., 606. These two cases do not appear to the editor to be reconcilable.

313. "BY RESIGNATION OR OTHERWISE." A Senator may resign prospectively; that is, limit the time when his resignation shall take effect; whereupon the Legislature may elect to fill the vacancy which has not "HAPPENED." And if before the time limited by the resigning Senator he die, the Senator elected shall take his seat. Rusk's speech in Dixon's Case, 1 Contested Elections, 611; Congressional Globe, 2d sess., 32d Cong., 2193, 2196. Can a Senator resign prospectively? Contradictory cases.

314. "UNTIL THE NEXT MEETING OF THE LEGISLATURE, WHICH SHALL THEN FILL SUCH VACANCIES." In practice, the next meeting of the Legislature is synonymous with the next session of the Legislature, during which time the member under executive appointment may hold his seat, unless it shall be filled by an election before the termination of a session. This is probably in analogy to the right of the President "to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of the next session." Phelps's Case, 1 Contested Elections, 617; Smith's Case, (1809,) Id., 616. What means the meeting of the Legislature? 33.

But if, after the appointment of the Governor, the Legislature meet and adjourn without holding an election or filling the vacancy, the commission of the Governor expires, and he can sit no longer. Williams's Case, 1 Contested Elections, 612; Phelps's Case, Id., 613, 614.

And if the Legislature meet and adjourn before the Governor appoints, the Governor has no right to appoint. Kensey Johns's Case, 1794; Phelps's Case, 1 Contested Elections, 616.

The sitting member, under executive appointment, has a right to occupy his seat until the vacancy shall be filled by the Legislature of the State, and the credentials of the member so elected are presented. Smith's Case, 1809; Winthrop's Case, 1 Contested Elections, 607, 608, 31st Cong. 2d Sess.; Globe, 461-464; Williams's Case, (2 Aug., 1854,) 1 Contested Elections, 612; Globe of 33d Cong., 1st sess., 2201, 2208, 2211;

References. Phelps's Case, (16 Jan., 1854,) 1 Contested Elections, 615-621; 32 Globe, part 1, pp. 1, 58, 343, 466, 514, 515, 547, 549, 552, 579, 584.

What are the qualifications of Senators? Page 77, note 35.

³No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

Define inhabitant? Page 57, note 35.

315. "AN INHABITANT OF THAT STATE FOR WHICH HE SHALL BE CHOSEN." General Ames was the commanding general in Mississippi, subject to military orders under the reconstruction laws, when he was chosen Senator of Mississippi. In a very long debate, it was insisted that an officer of the United States Army, who is constantly subject to superior orders, cannot be an inhabitant of a State where he had never before resided, within the meaning of this clause. But General Ames was admitted by an almost strict party vote. Senate Journal and Globe, 40th Cong., 2d sess.

Why was Shields rejected? 35.

316. "AND BEEN NINE YEARS A CITIZEN OF THE UNITED STATES." Shields was rejected because he had not been naturalized nine years. His resignation was refused. 1 Contested Elections, 606; 40 Globe, 327, 332.

Who presides over the Senate? Page 76, notes 36, 37.

⁴The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless equally divided.

How?

317. Mr. Calhoun believed that he had no power to call a Senator to order for words spoken in debate; that is, that he had no inherent powers.

The Chair had no power beyond the rules of the Senate. *It would stand in the light of a usurper were it to attempt to exercise such a power. It was too high a power for the Chair.*

* * * The Chair would never assume any power not vested in it; but would ever show firmness in exercising those powers that were vested in the Chair. (Congressional Debates, 1825-'26, p. 759.)

What are its powers?

The question with regard to the powers of the Chair was transferred from the Senate chamber to the public press, where it was discussed with memorable ability. An article in the National Intelligencer, under the signature of Patrick Henry, attributed to John Quincy Adams, at the time Presi-

Calhoun and Adams.

dent, assumed that the powers of the Vice President, in calling to order, were not derived from the Senate, but that they came strictly from the Constitution itself, which authorizes him *to preside*, and that in their exercise the Vice President was wholly independent of the Senate. To this assumption Mr. Calhoun replied in two articles, under the signature of Onslow, where he shows an ability not unworthy of the eminent parliamentarian whose name he for the time adopted. The point in issue was not unlike that now before us. It was insisted, on the one side, that certain powers were *inherent* in the Vice President, as presiding officer of the Senate, precisely as it is now insisted that certain powers are *inherent* in the Chief Justice when he becomes presiding officer of the Senate. Mr. Calhoun thus replied, in words applicable to the present occasion :

"I affirm that, as a presiding officer, the Vice President has no *inherent* power whatever, *unless that of doing what the Senate may prescribe by its rules be such a power*. There are, indeed, inherent powers, but they are in the *body* and not in the *officer*. He is a mere agent to exercise the will of the former. He can exercise no power which he does not hold by delegation, express or implied." (Calhoun's Life and Speeches, 17.)

What powers has he?

Then again he says, in reply to an illustration that had been employed :

"*There is not the least analogy between the rights and duties of a judge and those of a presiding officer in a deliberative assembly. The analogy is altogether the other way.*" It is between the court and the house. Ibid., 20; Sumner's Speech, 3 Trial of the President, 291.

This view of Mr. Calhoun led to an amendment of the rules giving the powers denied.

The following is necessary to complete note 37: Schuyler Colfax, from 4 March, 1869, to 4 March, 1873; Henry Wilson, from 4 March, 1873, to 22 November, 1875. The following Vice Presidents have died in office: George Clinton, 1812; Elbridge Gerry, 1813; William R. King, 1853; Henry Wilson, 1875.

Complete the list of Vice Presidents?

⁵ The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

What other officers does the Senate choose?
38.

318. "PRESIDENT PRO TEMPORE." The following have been the presiding officers of the Senate since the completion of the table in the first edition. The following is necessary to complete note 38:

Complete the list of Presidents pro tempore.

List of pre- siding offi- cers.	Names of Presidents pro tem- pore of the Senate.	Attended.	Retired.
	Benjamin F. Wade.....4	Mar. 1867.....	3 Mar. 1869
	Henry B. Anthony.....23	Mar. 1869.....	29 Mar. 1869
	Henry B. Anthony.....9	April 1869.....	22 Apr. 1869
	Henry B. Anthony.....28	May 1870.....	3 June 1870
	Henry B. Anthony.....1	July 1870.....	6 July 1870
	Henry B. Anthony.....14	July 1870.....	15 July 1870
	Henry B. Anthony.....10	Mar. 1871.....	10 Mar. 1871
	Henry B. Anthony.....17	April 1871.....	10 May 1871
	Henry B. Anthony.....22	May 1871.....	27 May 1871
	Henry B. Anthony.....21	Dec. 1871.....	21 Dec. 1871
	Henry B. Anthony.....23	Feb. 1872.....	26 Feb. 1872
	Henry B. Anthony.....8	June 1872.....	10 June 1872
	Henry B. Anthony.....4	Dec. 1872.....	9 Dec. 1872
	Henry B. Anthony.....13	Dec. 1872.....	13 Dec. 1872
	Henry B. Anthony.....29	Dec. 1872.....	6 Jan. 1873
	Henry B. Anthony.....24	Jan. 1873	24 Jan. 1873
	Matt. H. Carpenter....12	Mar. 1873.....	14 Mar. 1873
	Matt. H. Carpenter....26	Mar. 1873.....	26 Mar. 1873
	Matt. H. Carpenter....11	Dec. 1873.....	23 June 1874
	Matt. H. Carpenter....23	Dec. 1874.....	5 Jan. 1875
	Henry B. Anthony.....25	Jan. 1875.....	1 Feb. 1875
	Henry B. Anthony.....15	Feb. 1875.....	17 Feb. 1875
	Thomas W. Ferry.....9	Mar. 1875.....	11 Mar. 1875
	Thomas W. Ferry .....19	Mar. 1875.....	

What prin-
ciple was
settled aft-
er the
death of
Henry
Wilson?

Note 172.

Vice President Henry Wilson died at Washington on 22 November, 1875. It will be seen that Mr. Ferry had been elected presiding officer at the special session of the Senate of the 44th Congress. The question was immediately set afloat as to the effect of the death of the Vice President upon Mr. Ferry. Some contended that his office was vacated by the death; others that it was vacated by the reassembling of Congress in regular session; others that by the death the presiding officer, *ipso facto*, became the acting Vice President, and held the office beyond the control of the Senate. The editor reviewed the subject in the *Chronicle* of 25 December, 1875, and reciting the 4th and 5th clauses, art. II, sec. 1, cl. 5, and note 172, and the contradictory precedents cited in notes 38 and 316, as well as the salary act, (Rev. Stat., sec. 77,) which gives Mr. Ferry the Vice President's salary, he inclined to the opinion that were the question new Mr. Ferry would hold beyond the control of the Senate. To remove any apprehension as to the possible contingency of the death of the President, a resolution of Senator Edmunds had been passed, declaring Ferry the presiding officer until further action by the Senate. Mr. Edmunds also introduced a resolution for a new election, to be held on the 7th of January, 1876. This resolution was referred to the Committee on Elections. On 6 January Mr. Morton reported in behalf of the committee.

The report carefully reviews the history of every election for President *pro tempore* since the foundation of the Government, and arrives at the following conclusions: Resolutions.

“*Resolved*, That the tenure of a President *pro tempore* of the Senate, elected at one session, does not expire at the meeting of Congress after the first recess, the Vice President not having appeared to take the chair.

“That the death of the Vice President does not have the effect to vacate the office of President *pro tempore* of the Senate.

“That the office of President *pro tempore* of the Senate is held at the pleasure of the Senate.

“That the Hon. Thomas W. Ferry, the Senator from Michigan, who was elected President *pro tempore* of the Senate at the last session, is now the President *pro tempore*, by virtue of said election.”

The first two resolutions were unanimously adopted, and, on the motion of Mr. Thurman, time was given for consideration of the third.

January 12, after debate, Mr. White offered an amendment to the third resolution: “Until the happening of the contingency provided for in the 9th section of the act of Congress approved March 1, 1792, when he is authorized to act as President of the United States;” which was rejected. Mr. Morton’s third resolution was then passed—yeas 34, nays 15. The fourth resolution was then withdrawn. When Mr. Cox (February 17, 1875) was appointed or elected Speaker *pro tempore* of the House, in place of Mr. Kerr, who was absent, Mr. Garfield moved that the oath of office should be administered to him. It was objected to and shown that Mr. Dent, in 1798, was twice elected and the oath of office was not administered to him. And also that in 1848, after debate, the House had refused to require the Speaker *pro tem*, (Mr. Burt) to take the oath. So it was stated upon authority that the presiding officer of the Senate has never been required to take the oath. After full debate, the motion of Mr. Garfield was refused by a very large majority. Congressional Record, Feb. 18, 1876.

Note 172.

“The Senate shall have the sole Power to try all Impeachments. When sitting for that purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: and no Person shall be convicted without the Concurrence of two thirds of the Members present.

Who tries impeachments? Page 81, Note 39.

319. “SHALL HAVE THE SOLE POWER TO TRY ALL IMPEACHMENTS.” Impeachment is an institution avowedly Give the history of

impeach-
ments in
the House
of Lords.
321.

adopted by the United States from the practice of England. In Mr. T. Erskine's "Practical Treatise on the Law, Privileges, Proceedings, and Usage of Parliament," it is declared that "in impeachments the Commons, as the great representative inquest of the nation, first find the crime, and then, as prosecutors, support their charge before the Lords; while the Lords, exercising at once the functions of a high court of justice and of a jury, try and adjudicate the charge preferred." Substitute House of Representatives for "the Commons" and Senators for "the Lords," and we come precisely to the condition under our Constitution.

In England. The first impeachment by the House of Commons of England at the bar of the House of Lords was in the year 1376, in the reign of Edward III. During the next four reigns there were frequent impeachments, but not one in the reign of Edward IV, Henry VII, Henry VIII, Edward VI, Mary, or Elizabeth. Obnoxious subjects were dealt with in that interval by the readier and shorter mode of bills of attainder, or of pains and penalties, or by prosecutions in the Star Chamber. The practice of impeachment was revived in the reign of James I. Sir Giles Mompesson and Lord Chancellor Bacon were impeached in 1620, and from that year to the revolution of 1688 there were forty cases of impeachment—fifteen in the reigns of William III, Queen Anne, and George I; only one (that of Lord Lovat for high treason) in the reign of George II; and, in that of George III, that of Warren Hastings, which lasted from February 13, 1788 to April 25, 1795, and of Lord Melville, treasurer of the navy, which was begun on April 29, and ended on June 12, 1806. Hastings and Melville were respectively acquitted. The Duke of York, second son of George III, was virtually tried by the House of Commons, but not impeached, from January 27 to March 20, 1809, on charges of permitting his patronage as commander-in-chief of the army to be sold; and Queen Caroline, wife of George IV, was tried, by bill of pains and penalties, before the House of Lords, (but not by impeachment,) from July 5 to November 10, 1820.

The House of Commons reserves the right to prefer further articles from time to time. The accused is generally attached and retained in custody. The whole question of impeachment, as expounded in Hallam's Constitutional History of England, and May's Parliamentary Practice, is extremely interesting, and particularly worthy of attentive study. (*Washington Chronicle*, March 21, 1868.)

The Senate does not sit as a court, or in the exercise of judicial power, for that is committed to certain courts. Senator Sumner, 3 Trial of the President, 248.

The House of Lords, when sitting in the trial of impeachments, has never been called a court. *Id.*, 249. This is supported by the next clause, which limits the judgment to removal from office, and leaves the party subject to trial and

punishment. (1 Story's Com., § 805.) 3 Trial of the President, 249.

The power of the Chief Justice to decide incidental questions is three times denied in the Constitution: First, when it is declared that the Senate alone shall *try* impeachments; secondly, when it is declared that members only shall convict; and thirdly, when it is declared that the Chief Justice shall *preside*, and nothing more, thus conferring upon him those powers only which by parliamentary law belong to a presiding officer not a member of the body. Senator Sumner, 3 Trial of the President, 294.

What is the power of the Chief Justice?

320. CHALLENGES AND PRESIDING OFFICERS. No challenges lie against senators. Butler's Speech, Trial of the President, 89-95.

321.

The expression, "THE SOLE POWER," as the Senate will doubtless agree, necessarily means the *only* power. It includes everything pertaining to the trial. Every judgment that must be made is a part of the trial, whether it be upon a preliminary question or a final question. It seems to me that the words were incorporated in the Constitution touching this procedure in impeachment in the very light of the long-continued usage and practice in Parliament. It is settled, in the very elaborate and exhaustive report of the Commons of England upon the Lords' Journals, that the peers alone decide all questions of law and fact arising in such a trial. Manager Bingham in 1 Trial of the President, 180.

What means the sole power?

The Senate must determine every incidental question which, by possibility, can control the ultimate judgment of the Senate. (Lord Melville's Trial; Trial of Warren Hastings, 8 Burke, 42; 4 Institute, 15; Chase's Trial, 3 Benton's Debates.) Bingham's Speech, 1 Trial of the President, 180, 181.

That it is a trial; that it is classed as a crime; that the Senators try under oath; that they find the facts and pronounce judgment, prove that the Senate sits as a court, governed by the statute and common law. Curtis, 1 Trial of the President, 409-411.

He insisted that while the Chief Justice shall preside, the trial is to be by the Senate, and the judgment to be upon the votes of members of the Senate, of whom the Chief Justice is not. "TO PRESIDE" is to be merely the presiding officer, which is a synonym of speaker or prolocutor. He is merely the voice of the house; its speaker. This is the definition according to parliamentary law, to which we must look for the definition of words. (4 Coke's Institutes, 15.) Senator Sumner, 3 Trial of the President, 283.

321.

321. "TO TRY ALL IMPEACHMENTS." The articles must sufficiently advise the accused of what is intended to be proved. The Senate cannot admit evidence of another distinct fact in order to sustain a fact charged. Thus, under the charge that in violation of the tenure-of-office law the President appointed

What is necessary to the trial?

Trial.

an *ad interim* Secretary of War, "with intent unlawfully to control the disbursement of moneys appropriated for the military service and for the Department of War," it was not allowed to prove that he appointed an Assistant Secretary of the Treasury for that purpose. (1 Trial of the President, 258-268.)

Give the
history of
Johnson's
case.

The House, on the 22d of February, reported a resolution through the Judiciary Committee that "Andrew Johnson be impeached of high crimes and misdemeanors." On the 21st the Senate had sent a resolution to the President refusing to concur in the suspension of the Secretary of War. On the 22d the President sent a message to the Senate saying that he had removed the Secretary of War and appointed a Secretary *ad interim*. The House resolutions were debated and voted on the 22d. The articles were prepared and agreed to on the 24th. On the same day the President sent a message to the Senate giving his reasons for removing the Secretary of War. This message was offered in evidence: *Held*, that it was inadmissible to admit this statement made by the President after he was impeached. 1 Trial of the President, 537-545.

Stanton's
removal.

But the President was allowed to prove that he did acts showing that he intended to get up a law case to test his power in the courts. *Id.*, 597-623. But he was not allowed to prove his statements as to his intention being to make a temporary appointment until he sent a good name to the Senate. 1 Trial of the President, 258-268.

State the
oath?

322. "WHEN SITTING FOR THAT PURPOSE THEY SHALL BE ON OATH OR AFFIRMATION." The oath was administered by Mr. Justice Nelson, the senior associate justice of the Supreme Court of the United States, to Chief Justice Chase in the following words:

"I do solemnly swear that in all things appertaining to the trial of the impeachment of Andrew Johnson, President of the United States, I will do impartial justice according to the Constitution and the laws: so help me God." 1 Trial of the President, 11.

The same oath was administered to the Senators by the Chief Justice. For rules governing the trial of impeachments, 1 Trial of the President, 11-15.

The President appeared by counsel, and not in person. *Id.*, 18, 19.

A motion to postpone until the rebel States should be represented was rejected—yeas 2, nays 49. *Id.*, 36.

When Mr. Wade, the presiding officer, presented himself, Mr. Hendricks objected on the ground of his interest. After a long debate the objection was withdrawn. 3 *Id.*, 360-401.

How does

323. "WHEN THE PRESIDENT OF THE UNITED STATES

IS TRIED, THE CHIEF JUSTICE SHALL PRESIDE." Upon the trial of the President, General Thomas being under examination, Mr. Stanbery objected to a question of Manager Butler, as being illegal evidence, when the following proceedings took place :

When does the Chief Justice preside? 317, 318, 322.

THE CHIEF JUSTICE. The Chief Justice thinks the testimony is competent, and it will be heard unless the Senate thinks otherwise.

MR. DRAKE. I suppose, sir, that the question of the competency of evidence in this court is a matter to be determined by the Senate, and not by the presiding officer of the court. The question should be submitted, I think, sir, to the Senate. I take exception to the presiding officer of the court undertaking to decide a point of that kind.

Drake.

THE CHIEF JUSTICE. The Chief Justice is of opinion that it is his duty to decide preliminarily upon objections to evidence. If he is incorrect in that opinion it will be for the Senate to correct him.

MR. DRAKE. I appeal, sir, from the decision of the chair, and demand a vote of the Senate upon the question.

MR. FOWLER. Mr. Chief Justice, I beg to know what your decision is.

THE CHIEF JUSTICE. The Chief Justice states to the Senate that, in his judgment, it is his duty to decide upon questions of evidence in the first instance, and that if any Senator desires that the question shall then be submitted to the Senate, it is his duty to submit it. So far as he is aware, that has been the usual course of practice in trials of persons impeached in the House of Lords and in the Senate of the United States.

The Chief Justice.

MR. DRAKE. My position, Mr. President, is that there is nothing in the rules of this Senate, sitting upon the trial of an impeachment, which gives that authority to the Chief Justice presiding over the body.

MR. FESSENDEN. The Senator is out of order.

MR. JOHNSON. I call the honorable member from Missouri [Mr. Drake] to order. The question is not debatable in the Senate.

MR. DRAKE. I am not debating it; I am stating my point of order.

THE CHIEF JUSTICE. The Senator will come to order.

MR. MANAGER BUTLER. If the President please, is not this question debatable?

THE CHIEF JUSTICE. It is debatable by the managers and counsel for the defendant; not by Senators.

After some remarks by Manager BUTLER, the Chief Justice explained his position, claiming the right on constitutional grounds—that is, that as presiding officer of the Senate he might decide incidental questions, subject to correction by the Senate.

Butler.

Mr. BUTLER was proceeding to controvert the position when—

The CHIEF JUSTICE. Mr. Manager, the Chief Justice has no doubt of the right of the honorable managers to propose any question they see fit to the Senate, but it is for the Senate itself to determine how a question shall be taken.

Mr. Manager BUTLER. I understand the distinction. It is a plain one. The managers may propose a question to the Senate, and the Chief Justice decides it, and we then cannot get the question we propose before the Senate unless through the courtesy of some Senator. I think I state the position with accuracy; and it is the one to which we object, I again say, respectfully, as we ought, but firmly, as we must.

Mr. BUTLER proceeded to argue that all questions of law and fact were to be decided by the Senate, who were the judges, and not by the presiding officer. He cited the trial of Lord Stafford in 1680; the Earl of Cardogan's Case, in 1840; the trial of Lord Delemere, when Jeffries presided.

Mr. BINGHAM insisted that the seventh rule did not change the precedents.

How shall
the body be
addressed?

But on a motion to adjourn, there being a tie, the Chief Justice gave the casting vote, and the Senate adjourned. (Id., 276.) During the whole progress of the trial, the managers of the House and most of the Senators addressed the presiding officer as "Mr. President," and the court as "Mr. President and Senators," while the counsel of the President, upon all motions and objections, addressed "Mr. Chief Justice," and the court as "Mr. Chief Justice and Senators."

History.

[On the first March, 1870, Mr. Drake moved an amendment to the appropriation bill for judges, which denied that there was any such office as "Chief Justice of the United States," and he said that during the impeachment trial Chief Justice Chase assumed that title. The amendment passed the Senate. Globe and Journal of that day. 41st Cong. It is a little remarkable that the word "Chief Justice" is only mentioned in this clause of the Constitution. But he is called in the judiciary and other acts the Chief Justice of the Supreme Court.]

Sumner.

Mr. SUMNER assumed that under the power "to try all impeachments the Senate is the sole judge of every question of law and fact."

How was
the ques-
tion finally
decided?

The Senators retired, and after several propositions to the effect that the Chief Justice had no power to decide any question of law had been voted down, the following amendment of the seventh rule was agreed upon and reported to the Senate, sitting as a court:

"The presiding officer of the Senate shall direct all necessary preparations in the Senate chamber, and the presiding officer of the trial shall direct all the forms of proceeding while the Senate are sitting for the purpose of trying an impeachment, and all forms during the trial not otherwise specially provided for. And the presiding officer of the trial may rule

all questions of evidence and incidental questions, which The rule.
ruling shall stand as the judgment of the Senate, unless
some member of the Senate shall ask that a formal vote be
taken thereon, in which case it shall be submitted to the
Senate for decision, or he may, at his option, in the first in-
stance, submit any such question to a vote of the members of
the Senate."

Thus, for the first time, and it is to be hoped for the last,
it was settled how the "Chief Justice shall preside." Trial
of the President, p. 175-186, 277.

324. Although the debate and vote of the Senators upon
the power of the Chief Justice were in secret, Mr. Sumner
published his speech, from which we copy some extracts : What were
Sumner's
views?
321.

"The presiding officer can only give his opinion or argue
when he is a member of the House.

"The position of the speaker of the House of Lords is some-
what anomalous, for though he is the president of a delibera-
tive assembly, he is invested with no more authority than
any other member; and *if not himself a member, his office*
is limited to the putting of questions and other formal proceed-
ings. (May, Parliamentary Practice, 220, chap. 7.)

"Mr. May goes still further, and lets us know that it is only
as a member of the House that the presiding officer can ad-
dress it, *even on points of order.*

"Upon points of order the speaker, *if a peer*, may address
the House, but as his opinion is liable to be questioned, *like*
that of any other peer, he does not often exercise the right."
(Page 220.)

"Thus, even if a peer—even if a member of the upper House
—the presiding officer cannot rule a point of order nor address
the House upon it, except as any other member; and what he
says is open to question, like the utterance of any other
member. Such is the conclusion of the most approved Eng-
lish authority.

"American writers on parliamentary law concur with the
English. Cushing, who has done so much to illustrate this
whole subject, says of the presiding officer of the lords that
'he is invested with no more authority for the preservation
of order than any other member, and if not a member, his
office is limited to the putting of questions and other formal
proceedings; if he is a peer, he may address the House and
participate in the debate as a member.' He then says again,
'if a peer, he votes with the other members; if not, *he does*
not vote at all;' and he adds, '*there is no casting vote in the*
lords.' (§ 288.) This statement was made long after the
adoption of the national Constitution, and anterior to the
present controversy.

"There are occasions when the lords have a presiding offi-
cer, called a lord high steward. This is on the trial of a peer,
whether upon impeachment or indictment. Here again we
find the same rule stated by Edmund Burke, in his masterly

How far do
the Ameri-
can writers
concur?

Who pre-
sides on
the trial of
a peer?

Sumner. report to the House of Commons on the impeachment of Warren Hastings. These are his words :

Could the
Lord Chan-
cellor pre-
side with-
out being a
peer?

“*Every peer* present at the trial and every temporal peer hath a right to be present in every part of the proceeding, *vote*th upon every question of law and fact; and the question is carried by the major vote, *the lord high steward himself voting merely as a peer and member of that court, in common with the rest of the peers, and in no other right.*’ (Burke’s Works, vol. 6, 512, Bohn’s edition.)

“In another place the report, quoting the Commons’ journal, says :

“‘That the lord high steward was but as a speaker or *chairman* for the more orderly proceeding at the trial.’ (Id., 515.)

“In our day there have been instances where the lord chancellor sat as presiding officer without being a peer. Brougham took his seat on the 22d November, 1830, before his patent as a peer had been made out, and during this interval his energies were suppressed while he was simply presiding officer, and nothing else. The same was the case with that eminent lawyer, Sir Edward Sugden, who sat as presiding officer on the 4th of March, 1852, although he was still a commoner; and it was also the case with Sir Frederick Thesiger, who sat as presiding officer on the 1st March, 1858, although he was still a commoner. These instances attest practically the prevalence of the early rule down to our day. Even Brougham, who never shrank from speech or from the exercise of power, was constrained to bend to its exigency. He sat as lord chancellor, and in that character put the question; but this was all until he became a member of the House. Lord Campbell expressly records that while his name appears in the entry of those present on the 22d November, 1830, as *Henricus Brougham, Cancellarius*, ‘he had no right to debate and vote till the following day,’ when the entry of his name and office appears as *Dominus Brougham et Vaux, Cancellarius*.

“I pass from these examples of recent history, and go back to the rule as known to our fathers at the adoption of the Constitution. On this head the evidence is complete. It will be found in the State Trials of England, in parliamentary history, and in the books of law, but it is nowhere better exhibited than in the Lives of the Chancellors, by Lord Campbell, himself a member of the House of Lords and a chancellor, familiar with it historically and practically. He has stated the original rule, and in his work, which is as interesting as voluminous, has furnished constantly-recurring illustrations of it. In the introduction to his Lives, where he describes the office of chancellor, Lord Campbell enunciates the rule, which I give in his own words :

“‘Whether peer or commoner, the chancellor is not, like the speaker of the Commons, *moderator* of the proceedings of the House in which he seems to preside. He is not addressed

in debate; he does not name the peer who is to be heard; *Sumner. he is not appealed to as an authority on points of order*; and he may cheer the sentiments expressed by his colleagues in the ministry.' Campbell's *Lives of Chancellors*, vol. 1, p. 17.

"The existing rules of the Senate have added to these powers; but such is the rule with regard to the presiding officer of the House of Lords, *even when a peer*. He is not appealed to on points of order. If a commoner, his power is still less.

" 'If he be a commoner, notwithstanding a resolution of the House that he is to be proceeded against for any misconduct as if he were a peer, *he has neither vote nor deliberative voice, and he can only put the question and communicate the resolutions of the House according to the directions he receives.*' " (Id.)

Mr. Sumner reviewed the whole history of trials in England, to show that these were the general rules; that is, that a presiding officer who is not a member can neither speak nor decide, from which he deduced as follows:

"The conclusion is irresistible that, when our fathers provided that on the trial of the President of the United States 'the Chief Justice shall *preside*,' they used the term 'preside' in the sense it had already acquired in parliamentary law, and did not intend to attach to it any different signification; that they knew perfectly well the parliamentary distinction between a presiding officer a member of the House and a presiding officer not a member; that in constituting the Chief Justice presiding officer for a special temporary purpose, they had in view similar instances in the mother country, when the lord keeper, chief justice, or other judicial personage had been appointed to 'preside' over the House of Lords, of which he was not a member, as our Chief Justice is appointed to preside over the Senate, of which he is not a member; that they found in this constantly-recurring example an apt precedent for their guidance; that they followed this precedent to all intents and purposes, using, with regard to the Chief Justice, the received parliamentary language that he shall 'preside,' and nothing more; that, according to this precedent, they never intended to impart to the Chief Justice, president *pro tempore* of the Senate, any other powers than those of a presiding officer, not a member of the body; and that these powers, as exemplified in an unbroken series of instances extending over centuries, under different kings and through various administrations, were simply to put the question and to direct generally the conduct of business, without undertaking in any way, by voice or vote, to determine any question preliminary, interlocutory, or final."

We lose the benefit of the arguments of other Senators in secret session, because they were not published.

325. On the motion to retire for consultation there was

A tie.

a tie in the Senate, and the Chief Justice gave the casting vote. On the 1st of April Mr. Sumner offered the following resolution :

"It appearing on the reading of the journal of yesterday that, on a question where the Senate was equally divided, the Chief Justice, presiding on the trial of the President, gave the casting vote, it is hereby declared that, in the judgment of the Senate, such vote was without authority of the Constitution of the United States."

But it was decided in the negative—yeas 21 ; nays 27. (1 Trial of the President, 187.)

How many
Senators
must con-
cur?

326. "AND NO PERSON SHALL BE CONVICTED WITHOUT THE CONCURRENCE OF TWO-THIRDS OF THE MEMBERS PRESENT." Upon the trial of Andrew Johnson, all the Democratic Senators and six Republican Senators voted for the acquittal. All the other Republican Senators voted guilty. Consequently, as will be seen, the vote stood—"guilty," 35. "not guilty," 19. A change of one vote would have secured a conviction. By an order of the Senate, the XIth article of the charges by the House, which gave, as inducement, the President's speech of 18 August, 1866, to a committee from the Philadelphia Convention, in which he denied the constitutional existence of Congress, and then proceeded to the charge that, in violation of the tenure-of-office law, he removed Edwin M. Stanton, &c., &c., was tried first. The result was as follows :

How stood
the vote on
the trial?

GUILTY—Messrs. Anthony, Cameron, Cattell, Chandler, Cole, Conkling, Conness, Corbett, Cragin, Drake, Edmunds, Ferry, Frelinghuysen, Harlan, Howard, Howe, Morgan, Morrill of Maine, Morrill of Vermont, Morton, Nye, Patterson of New Hampshire, Pomeroy, Ramsey, Sherman, Sprague, Stewart, Sumner, Thayer, Tipton, Wade, Willey, Williams, Wilson, and Yates—35.

NOT GUILTY—Messrs. Bayard, Buckalew, Davis, Dixon, Doolittle, Fessenden, Fowler, Grimes, Henderson, Hendricks, Johnson, McCreery, Norton, Patterson of Tennessee, Ross, Saulsbury, Trumbull, Van Winkle, and Vickers—19. 2 Trial of the President, 488, 489, 16 May, 1870.

The result having been announced by the Chief Justice, the Senate then adjourned the trial for ten days.

On 26 May, 1868, votes were taken upon the second and third articles, with the same result, after which the Senate adjourned, without any vote having been taken upon the remaining articles.

So the whole trial was upon the removal of the Secretary of War, and the appointment of Lorenzo M. Thomas *ad interim*, contrary to the law regulating the tenure of office. Opinions were filed by thirty Senators, as follows :

Messrs. Buckalew, Cattell, Davis, Doolittle, Edmunds, Ferry, Fessenden, Fowler, Frelinghuysen, Grimes, Harlan,

Henderson, Hendricks, Howard, Howe, Johnson, Morrill of Opinions.
Maine, Morrill of Vermont, Patterson of New Hampshire,
Pomeroy, Sherman, Stewart, Sumner, Tipton, Trumbull,
Van Winkle, Vickers, Williams, Wilson, Yates.

327. THE CONCLUSION. It may be assumed from the arguments that the thirteen Democratic Senators (including Mr. Van Winkle) held that there could be no impeachment, except for treason, bribery, or a statutory felony or misdemeanor—that is, a crime against the United States, prescribed and defined by act of Congress. Hence, all these Senators would have sustained a demurrer or a motion in arrest of judgment to every charge. They admitted no offenses against good morals merely; no common-law offenses; no parliamentary precedent impeaching for merely political offenses, or bad behavior. This was not the ground of Senators Fessenden or Trumbull, two Republican leaders, who voted for the acquittal. It is not in accordance with any of the preceding impeachment trials, nor, indeed, is it the general opinion of constitutional lawyers.

What conclusion from the arguments

It may also be assumed that all the Democratic Senators, and also Senator Fowler, held that the tenure-of-office law was unconstitutional; that the right to remove by the President, without the power of Congress to restrain him, was a constitutional power, pure and simple, and one that could not be controlled by Congress; for that, the debate and the law of 1789 so settled it. But this view was not held by Mr. Fessenden nor Mr. Trumbull. They held that the act of 1795, for temporary appointments, was still in force; that, in the absence of any restraining law provided by Congress, the President may remove cabinet officers; that Mr. Stanton, not having been appointed by President Johnson, he was not protected by the tenure-of-office law of 1867, and hence his removal was neither a crime nor a violation of the Constitution. This latter consideration, and the benefit of doubts, saved the President. The thirty-five who voted for conviction may be said to have denied the right of removal, as a constitutional right of the President. They believed the power to be subject to legislative control, and also that Mr. Stanton was within the purview of the law of 1867. They also believed that high crimes and misdemeanors are not necessarily statutory, but they may consist of those things which render an incumbent morally unfit to exercise the trust confided to him.

What is to be deduced from the opinions?

The trial is very valuable in settling questions of practice, and because it exhausts the whole learning upon the subject of impeachment. It is unfortunate that it leaves the definitions of "high crimes and misdemeanors" still open, although it must be admitted that the weight of authority is with the majority. And it may be said that a judgment of impeachment may rest upon the finding of such facts as

What was described as to high crimes and misdemeanors? Note 191.

Misde-
meanors.

show such moral depravity and unfitness for the duties of office as render it dangerous to the State that the party should be longer intrusted with its exercise. Such, at any rate, are the English parliamentary precedents, to which the framers of the Constitution had reference in the use of the word *impeachment*. So the course of legislation, as disclosed in the trial, may be said to have settled that Congress may restrict the power of removal, as has been done as to military and certain treasury officers. So Congress may prescribe a penalty against improper removals. This does not seem to violate the general axiom that the power of removal is an incident to the power to appoint. For the President can complete no appointment without the advice and consent of the Senate. Therefore, if the right rested upon that axiom merely, the consent of the Senate would have to be given to the removal as well as to the appointment. Full references are given by the editor to the arguments and opinions of the Senators. It can hardly be said that the precedent determines anything except that the necessary two-thirds did not vote for the conviction. And even had conviction been had by the united vote of the Republicans, perhaps the country would have attributed the result to political considerations—particularly after the Chicago Convention resolved that “Andrew Johnson was rightfully impeached.” Possibly a case may never arise where any other force would be given to the impeachment of the President.

What is the
judgment
in cases of
impeach-
ment?
Page 82,
note 40.

“Judgment in Cases of Impeachment shall not extend further than to Removal from Office, and Disqualification to hold and enjoy any Office of Honor, Trust, or Profit under the United States; but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment, and Punishment, according to Law.

Gen. Lo-
gan's view.

328. “JUDGMENT IN CASES OF IMPEACHMENT SHALL NOT EXTEND FURTHER THAN TO REMOVAL FROM OFFICE.” It was argued by Manager Logan that, as every officer except the President and Vice President were removable by some superior power for mere political objections, or for misbehavior or misconduct not indictable, and as the judgment may stop with removal from office, and must stop with removal and disqualification, that the President may be removed for whatever misbehavior the House finds to be ground of impeachment, and the Senate decides to be sufficient ground of impeachment, as insanity; for that he holds “*dum se bene gesserit*.” 2 Trial of the President, 23.

As to how far the evidence must sustain the charges, *Id.*, Logan. 269-276.

Under the general practice in impeachments, judgment is never given by the House of Peers until demanded by the House of Commons. (Manager Butler.) 1 Trial of the President, 589.

When is judgment given?

SECTION 4. ¹The Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof: but the Congress may at any Time by Law make or alter such Regulations, except as to the Places of chusing Senators.

Whe pre-scribes the times, places, and manner of election? Page 83, note 47.

329. "THE TIMES, PLACES." The conventions of Virginia, Massachusetts, New Hampshire, New York, Rhode Island, and South Carolina, accompanied their ratifications with a protest against the exercise of this power; and North Carolina refused its ratification because it existed. The Districting Controversy, Douglas Rep., 15 March, 1842; Contested Elections, 50-52.

Give the history of the clause.

It was intended that the power should remain exclusively with the Legislatures, subject to the condition only that Congress might alter the State regulations or make new ones, in the event the State should refuse to act in the premises, or should legislate in such manner as would subvert the rights of the people to a free and fair representation. Douglas' Rep., *Id.*, 51. But see Madison's views, Garrett Davis' Report in the same case, *Id.*, 58; and Hamilton's views, *Id.*, 59. The power of Congress is discretionary. 59. Congress may alter or make the regulations. *Id.*, 60; 1 Bartlett, 47-55; American Election Law, §§ 105, 106.

The power of Congress.

The question again came before the House upon the mandatory clause in the apportionment law of 1872. Mr. Trescott, of South Carolina, presented a memorial to the House, stating and showing that in the act of South Carolina to redistrict the State the third district of South Carolina was not "contiguous territory," but one county was separated by two others intervening between the sixth and the seventh. On 15 January, 1876, Mr. Trescott addressed the House committee, after due notice had been given to all the representatives from South Carolina. Mr. Trescott reviewed the general ticket question of 1842, (28th Congress.) and the more recent case of Phelps and Cavanaugh, of Minnesota. 1 Bartlett, 148. The discussions among members of the committee went back to the original interpretation of the respective powers of the State and of Congress. But the real question is, as it was in 1842, as to

Mandatory. the effect of disregarding the mandatory section of the act of Congress requiring districting and prescribing the mode.

What of the manner? "AND MANNER OF HOLDING ELECTIONS." Prior to the act of Congress given in the notes the *mode* of electing Senators was left to the Legislature. And different modes existed in different States. *Yulee v. Mallory*, 3 Contested Elections, 608, 609. And the same diversities existed as to the numbers required to elect Representatives. *Id.*, 609; Appendix to Congressional Globe, 1st sess. 31st Cong., 1170, 1176.

What is the legislature? **330.** "SHALL BE PRESCRIBED BY THE LEGISLATURE THEREOF." After the act of secession by the convention of Virginia, in 1861, a convention from thirty nine counties assembled at Wheeling on the 11th June, 1862, and, on the 19th of the same month, adopted "an ordinance for the reorganization of the State government." This ordinance provided for a Legislature, which assembled and elected Senators, and assumed all the functions of legislation. After the Legislature had been some time in session, on the 20th August, 1861, the convention provided for an election for members of Congress from districts not represented. Dawes' Report, 20 Jan., 1862, 3 Contested Elections, 427, 428. After quoting this clause, the report said: "It is a legislative act. It is law. When there is a Legislature in session, all laws shall originate in it. They cannot originate anywhere else." (*Id.*, 429.) And again: "A new government must begin somewhere, and there must be somebody to make it. As necessity was the foundation, so also it was the limit, of the power called into being for the sole purpose of inaugurating a new government. It could do anything necessary to carry out that purpose, and when that was done it could do no more. Its functions ceased the moment the new government took on form and life. The two cannot, in the nature of things, exist and move *pari passu*." (Dawes' Report in Segar's Case, 3 Contested Elections, 429.)

Are conventions such?

The principle may be correct, that after the convention calls a new government into the exercise of power its own functions cease. But all general declarations, and, indeed, precedents, during revolutionary times, are to be received with reference to the particular cases, and not as applicable to other circumstances. The legislative acts, other than for the mere purpose of calling into existence the new government, have been ordained by conventions and sanctioned as law. *Stewart v. Crosby*, 15 Tex., 548; *Causici v. La Coste*, 20 Tex., 285; *Cowan v. Hardeman*, 26 Tex., 216; Paschal's Annot. Dig., 76, 77, note 215; *Id.*, 712, art. 4631a; *Cunningham v. Perkins*, 28 Tex., 488.

Mr. Segar, in his case, contended that a convention of the people possessed plenary powers, and that "by the Legislature," might mean a convention of the people. 3 Contested

Elections, 433. Mr. Noel showed that the convention of Missouri set aside a secessionist Governor and Legislature, and itself remained the only legislative body in that State. *Id.*, 434. Conventions.

Mr. Crittenden urged that a convention is clothed with sovereign powers in the State, and that it might prescribe the times, places, and manner of electing Representatives in the State constitution, and that this would be by the Legislature thereof, in the highest sense of the term. The object was to give the State the power of conducting these elections, and that the people may speak through a convention as well as through a legislature. 3 Contested Elections, 435; Same speech, 46 *Globe*, 753; see the Debate, 46 *Globe*, 733-755. Crittenden.

As the decision sustained the report of Mr. Dawes, it may be taken as a precedent, that the House being in session, the convention could not, at the same time, prescribe the time of election, without settling the question of the general power of a convention to legislate. In *Wells v. Bain*, 75 Penn. R., all legislative power, and all power beyond proposing a constitution to the people, was denied.

331. "THE TIMES." That the military governor of the State fixed the *time* on a day different from that prescribed for the regular election was not sufficient cause to defeat representation. *Flander's and Hahn's Case*, 3 Feb. 1863, Contested Elections, 438. In this case it was urged that as the regular election failed because of secession, and the Governor and people being engaged in the rebellion, the people who acknowledged their allegiance to the United States should not be defeated of representation, because there was no legislative power to fix a time. Mr. Bingham ably argued that as the time had neither been fixed by the Legislature nor by Congress, but only by a military governor, it was not an election under the Constitution. *Id.*, 453, 454; same speech, 47 *Globe*, p. 862.

Who may
fix the
time?

The debate has much interest. 47 *Globe*, 831, 855, 861, 866; 48 *Globe*, 1011-1030. But the precedent, like the functions of the military governor, grew out of the necessity of the case.

Where the proclamations of the commanding general and the military governor disregarded the constitution and laws of Virginia, the member was refused his seat. *Cloud v. King*, 3 Contested Elections, 455, affirmed 23d February, 1863; *Grafflin's Case*, 3 Contested Elections, 464; *Hawkins's Case*, *Id.*, 436; *McKenzie v. Kitchen*, *Id.*, 463.

The State not having been divided into congressional districts, as required by the apportionment upon the census of 1860, the Representatives were refused their seats. *Field's Case of Louisiana*, 25 January, 1854, 3 Contested Elections, 580. After the convention districted the State, Benzaro was allowed to take his seat. *Id.*, 583

What is the
power of
Congress?

332. "BUT THE CONGRESS MAY AT ANY TIME, BY LAW, MAKE OR ALTER SUCH REGULATIONS, EXCEPT AS TO THE PLACES OF CHUSING SENATORS."

Define to
"alter."

TO "ALTER," imports a greater power than any other term, except to make, or its synonym. It is to strike from, add to, or modify. Garrett Davis, 3 Contested Elections, 61. The power of Congress is as broad as that of a State. Id. And Congress may alter and make uniform regulations for the choice of Senators. Or an uniform time for choosing Representatives. Id., 61.

These reports and the debates during that session exhausted the subject. Neither report was fully agreed to. But as the law in question only declared that the members should be elected by districts, but made no provision for districting, the power was said not to have been exercised, and the members elected from four States by general ticket were allowed to retain their seats. 3 Contested Elections, 47-69; Congressional Globe, vol. 13, parts 1 and 2. The States afterwards districted, and the controversy ended. In the 41st Congress, 2d session, the House passed a bill fixing an uniform time, without much debate. The power is now generally conceded except by the extreme men, who believe that the power of Congress is dormant until the States refuse to act.

88.

The States may district their States, and may redistrict them, without waiting for a new apportionment. It is a matter within the discretion of the Legislatures. It is conceded that Congress could by law have exclusively determined the extent of each district, and enacted that it should remain unchanged, under the apportionment, during the entire period of ten years. But this has not been done by the act of 25 June, 1852, which is only commendatory. 3 Contested Elections, (Jared Davis,) Perkins' Case, 143.

What day
has been
fixed?

The Tuesday next after the first Monday in November, 1876, and on the same day every two years thereafter, is established as the day for the election of Representatives and Delegates in Congress. Act of 2 February, 1872, § 11, 17 Stat., p. 29; Rev. Stat., sec. 25.

When shall
Congress
assemble?
Page 83,
notes 42, 43

²The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

333. *Statement of the beginning and ending of each legislative session of Congress, from 1789 to 1876.*

When have
been ses-
sions?

CONGRESS.	SESSION.	BEGAN.	ENDED.
1st.....	1st.....	March 4, 1789.	Sept. 29, 1789.
1st.....	2d.....	January 4, 1790.	August 12, 1790.
1st.....	3d.....	December 6, 1790.	March 3, 1791.
2d.....	1st.....	October 24, 1791.	May 8, 1792.
2d.....	2d.....	November 5, 1792.	March 2, 1793.
3d.....	1st.....	December 2, 1793.	June 9, 1794.
3d.....	1st.....	November 3, 1794.	March 3, 1795.
4th.....	2d.....	December 7, 1795.	June 1, 1796.
4th.....	2d.....	December 5, 1796.	March 3, 1797.
5th.....	1st.....	May 15, 1797.	July 10, 1797.
5th.....	2d.....	November 13, 1797.	July 16, 1798.
5th.....	3d.....	December 3, 1798.	March 3, 1799.
6th.....	1st.....	December 2, 1799.	May 14, 1800.
6th.....	2d.....	November 17, 1800.	March 3, 1801.
7th.....	1st.....	December 7, 1801.	May 3, 1802.
7th.....	2d.....	December 6, 1802.	March 3, 1803.
8th.....	1st.....	October 17, 1803.	March 27, 1804.
8th.....	2d.....	November 5, 1804.	March 3, 1805.
9th.....	1st.....	December 2, 1805.	April 21, 1806.
9th.....	2d.....	December 1, 1806.	March 3, 1807.
10th.....	1st.....	October 26, 1807.	April 25, 1808.
10th.....	2d.....	November 7, 1808.	March 3, 1809.
11th.....	1st.....	May 22, 1809.	June 28, 1809.
11th.....	2d.....	November 27, 1809.	May 1, 1810.
11th.....	3d.....	December 3, 1810.	March 3, 1811.
12th.....	1st.....	November 4, 1811.	July 6, 1812.
12th.....	2d.....	November 2, 1812.	March 3, 1813.
13th.....	1st.....	May 24, 1813.	August 2, 1813.
13th.....	2d.....	December 6, 1813.	April 18, 1814.
13th.....	3d.....	September 19, 1814.	March 3, 1815.
14th.....	1st.....	December 4, 1815.	April 30, 1816.
14th.....	2d.....	December 2, 1816.	March 3, 1817.
15th.....	1st.....	December 1, 1817.	April 20, 1818.
15th.....	2d.....	November 16, 1818.	March 3, 1819.
16th.....	1st.....	December 6, 1819.	May 15, 1820.
16th.....	2d.....	November 13, 1820.	March 3, 1821.
17th.....	1st.....	December 3, 1821.	May 8, 1822.
17th.....	2d.....	December 2, 1822.	March 3, 1823.
18th.....	1st.....	December 1, 1823.	May 27, 1824.
18th.....	2d.....	December 6, 1824.	March 3, 1825.
19th.....	1st.....	December 5, 1825.	May 22, 1826.
19th.....	2d.....	December 4, 1826.	March 3, 1827.
20th.....	1st.....	December 3, 1827.	May 26, 1828.
20th.....	2d.....	December 1, 1828.	March 3, 1829.
21st.....	1st.....	December 7, 1829.	May 31, 1830.
21st.....	2d.....	December 6, 1830.	March 3, 1831.
22d.....	1st.....	December 5, 1831.	July 16, 1832.
22d.....	2d.....	December 3, 1832.	March 2, 1833.
23d.....	1st.....	December 2, 1833.	June 30, 1834.
23d.....	2d.....	December 1, 1834.	March 3, 1835.
24th.....	1st.....	December 7, 1835.	July 4, 1836.
24th.....	2d.....	December 5, 1836.	March 3, 1837.
25th.....	1st.....	September 4, 1837.	October 16, 1837.
25th.....	2d.....	December 4, 1837.	July 9, 1838.
25th.....	3d.....	December 3, 1838.	March 3, 1839.
26th.....	1st.....	December 2, 1839.	July 21, 1840.
26th.....	2d.....	December 7, 1840.	March 3, 1841.
27th.....	1st.....	May 31, 1841.	Sept. 13, 1841.

Regular
sessions.*Statement, &c.—Continued.*

CONGRESS.	SESSION.	BEGAN.	ENDED.
27th.....	2d	December 6, 1841.	August 31, 1842.
27th.....	3d	December 5, 1842.	March 3, 1843.
28th.....	1st.....	December 4, 1843.	June 17, 1844.
28th.....	2d	December 2, 1844.	March 3, 1845.
29th.....	1st.....	December 1, 1845.	August 10, 1846.
29th.....	2d	December 7, 1846.	March 3, 1847.
30th.....	1st.....	December 6, 1847.	August 14, 1848.
30th.....	2d	December 4, 1848.	March 3, 1849.
31st.....	1st.....	December 3, 1849.	Sept. 30, 1850.
31st.....	2d	December 2, 1850.	March 3, 1851.
32d.....	1st.....	December 1, 1851.	August 31, 1852.
32d.....	2d	December 6, 1852.	March 3, 1853.
33d.....	1st.....	December 5, 1853.	August 7, 1854.
33d.....	2d	December 4, 1854.	March 3, 1855.
34th.....	1st.....	December 3, 1855.	August 18, 1856.
34th.....	2d	August 21, 1856.	August 30, 1856.
34th.....	3d	December 1, 1856.	March 3, 1857.
35th.....	1st.....	December 7, 1857.	June 14, 1858.
35th.....	2d	December 6, 1858.	March 3, 1859.
36th.....	1st.....	December 5, 1859.	June 25, 1860.
36th.....	2d	December 3, 1860.	March 3, 1861.
37th.....	1st.....	July 4, 1861.	August 6, 1861.
37th.....	2d	December 2, 1861.	July 17, 1862.
37th.....	3d	December 1, 1862.	March 3, 1863.
38th.....	1st.....	December 7, 1863.	July 4, 1864.
38th.....	2d	December 5, 1864.	March 3, 1865.
39th.....	1st.....	December 4, 1865.	July 28, 1866.
39th.....	2d	December 3, 1866.	March 3, 1867.
40th.....	1st.....	March 4, 1867.	March 30, 1867.
40th.....	2d	December 2, 1867.	Nov. 10, 1868.*
40th.....	3d	December 7, 1868.	March 3, 1869.
41th.....	1st.....	March 4, 1869.	April 10, 1869.
41st.....	2d	December 6, 1869.	July 15, 1870.
41st.....	3d	December 5, 1870.	March 3, 1871.
42d.....	1st.....	March 4, 1871.	April 20, 1871.
42d.....	2d	December 4, 1871.	June 10, 1872.
42d.....	3d	December 2, 1872.	March 4, 1873.
43d.....	1st.....	December 1, 1873.	June 23, 1874.
44th.....	1st.....	December 6, 1875.	.....

And the
special ses-
sions of the
Senate?*Statement of the beginning and ending of each special session
of the Senate, from 1789 to 1868.*

Began.	Ended.
March 4, 1791.....	March 4, 1791.
March 4, 1793.....	March 4, 1793.

43.

*This 2d session of the 40th Congress was begun 2d December, 1867, was adjourned 27th July, 1868, to meet 21st September, 1868; met on that day, and, on the same day, was adjourned to meet on 16th October, 1868. Met on that day, and on the same day was again adjourned to meet 10th November, 1868; met on that day, and was then adjourned without day. The law set out in note 43, page 84, has been repealed, so that Congress has but two sessions, commencing, of course, on the first Monday in December, of each year. It expires on the fourth of March. The existence of a Congress is, in fact, fifteen months. I do not find that the law defining the sessions has been transferred to the Revised Statutes.

Began.	Ended.	Special sessions.
June 8, 1795.....	June 26, 1795.	
March 4, 1797.....	March 4, 1797.	
July 17, 1798.....	July 19, 1798.	
March 4, 1801.....	March 5, 1801.	
March 4, 1809.....	March 7, 1809.	
March 4, 1817.....	March 6, 1817.	
March 4, 1825.....	March 9, 1825.	
March 4, 1829.....	March 17, 1829.	
March 4, 1837.....	March 10, 1837.	
March 4, 1841.....	March 15, 1841.	
March 4, 1845.....	March 20, 1845.	
March 5, 1849.....	March 23, 1849.	
March 4, 1851.....	March 13, 1851.	
March 4, 1853.....	April 11, 1853.	
March 4, 1857.....	March 14, 1857.	
June 15, 1858.....	June 16, 1858.	
March 4, 1859.....	March 10, 1859.	
June 26, 1860.....	June 28, 1860.	
March 4, 1861.....	March 28, 1861.	
March 4, 1863.....	March 14, 1863.	
March 4, 1865.....	March 11, 1865.	
April 1, 1867.....	April 20, 1867.	
April 12, 1869.....	April 22, 1869.	
May 10, 1871.....	May 27, 1871.	
March 4, 1873.....	March 26, 1873.	
March 5, 1875.....	March 24, 1875.	

1 Trial of the President, 595. The above statement of Mr. Forney has been corrected by Mr. G. C. Dawson, Librarian of the Senate.

SECTION 5. ¹Each House shall be the Judge of the Elections, Returns, and Qualifications of its own Members; and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties, as each House may provide.

Who judges of the elections, qualifications, and returns of its own members? Pages 44-46.

334. "EACH HOUSE SHALL BE THE JUDGE OF THE ELECTIONS RETURNS AND QUALIFICATIONS OF ITS OWN MEMBERS." The mode of contesting elections, so as to invoke the judgment of the House of Representatives, is re-enacted in the Revised Statutes, chap. 8, secs. 105-130, as amended by the act of 2 March, 1875. (19 Stat., 2.) The contest is opened

What is the mode of contesting elections?

Contest.

within thirty days after the decision, by notice particularly specifying the grounds of the contest. The answer must be returned within thirty days, and it must admit or deny the grounds, and may set up new matter. The contestant is given forty days to take evidence, giving notice; the contestee forty days, and the contestant ten to rebut. All must be closed in ninety days. The statute prescribes the officers to examine and the other regulations. As for the manner of service and proof thereof, of the notice and answer. See *Follett v. Delano*, 2 Bartlett, 115. And for a review of the practice see *American Law of Elections*, § 394.

What was
Caldwell's
case?

335. CONTESTS IN THE SENATE. In the case of Alexander Caldwell, of Kansas, certain charges of bribery, &c., were preferred against the Senator eighteen months after he had taken his seat. The Committee on Privileges and Elections reported a volume of evidence. Caldwell admitted that he had paid Thomas Carney \$15,000 to retire from the contest, and it was found that much money was employed to secure his election, but that Caldwell paid any member of the Kansas Legislature to vote for him was not proved. However, the facts were not so material in the view taken of the law by the Senators in the long record of debates at the called session of the Senate. (43d Cong., 1873.) Mr. Morton, chairman of the Committee on Elections, reported "that Alexander Caldwell was not duly and legally elected to a seat in the Senate of the United States by the Legislature of the State of Kansas."

The legal positions taken by Mr. Caldwell are stated in his written defense, as follows:

What was
Caldwell's
defense?

1. That his admitted transaction with Mr. Carney was a private affair between citizens, and was not denounced as illegal by any statute, State or Federal, and, therefore, about this, the Senate had no legal right to inquire.

2. That bribing the members of the Legislature to vote for a candidate is not made a criminal offense by any statute of the United States, and that a member of the Senate cannot be unseated for bribery, because he cannot be indicted and punished for it in court.

3. That the question of bribery in the election of a Senator can, under no circumstances, be inquired into by the Senate of the United States, but that the right to make investigation belongs only to the State; and that the Senate is concluded by his commission from the State from all inquiries except as to whether he possesses the qualifications required by the Constitution of the United States.

4. That the Senate has no power to expel a member for any cause arising before he became a member of the body.

In short, the plea of Mr. Caldwell is a denial of the jurisdiction of the Senate: 1, specially over the question of ante-election bribery; and, 2, generally over any matter of

ante-election misconduct. He virtually assumes that the act of which he is accused is not wrong because not made punishable by statute, and that the Senate cannot legally declare an election void for a particular act until Congress or a State Legislature has passed a law providing to punish such act as a criminal offense.

Grounds of defence.

The Senators who denied the jurisdiction of the Senate, put their arguments upon various grounds. The extreme States rights' advocates assumed, that in the election of a Senator, the States act in their sovereign character; that the States determine for themselves who shall choose the legislators, and the legislators determine, in the sovereign legislative capacity of the States, who shall be Senator; and that when he has been so chosen and commissioned, the power of the Senate is confined to the question of the qualifications of age and citizenship; that the only inquiries as to the election are, was there a Legislature and did the Legislature, choose, and was the person commissioned duly chosen? Republicans who sided with them seemed to place themselves upon the ground that the motives of the State legislators could not be the subject of inquiry, and therefore if there was bribery, it could only be reached by the criminal punishment of the bribed and the bribers, or, as some said, by seating the commissioned Senator, and then expelling him for the crime or impropriety in obtaining his election. There seemed to be a pretty general agreement that although the power of judging was given to each House in the same words, yet in practice there must be a difference. For example, it was admitted that the first thing for the House to determine is, to whom of its people have the States confided the power of choosing representatives? Have the people so authorized, chosen at the time and in the manner prescribed by the State laws? Was there such fraud, bribery, corruption, intimidation, &c., as to vitiate the election? And, finally, does the person holding the certificate of election possess the constitutional qualifications?

How were the Senators divided?

But it was denied (and too generally conceded) that the Senate could judge as to whether the legislators of the State possessed the qualifications required by the State constitutions. It was assumed that the constitutions of the States give to each of their own houses the right to judge of the elections, returns, and qualifications of its own members; and this power, it was said, was exclusive; and therefore the Senate could not determine the legal qualifications of these electors. Whatever was illogical in this argument was *obit*, as no question as to the qualifications of any Kansas legislator was presented. The real issue was, whether buying off an opposite candidate and purchasing votes (if a majority of the Senate was convinced that such was the fact) vitiated the election so far as to authorize the Senate to assume that the Legislature of Kansas had not elected a Senator within

What was assumed as to the right to judge of qualifications of State legislators?

The true
issue.

the sense of the Constitution. Those who took the affirmative assumed that there was no doubt about the facts; that buying off the opposition of Carney was itself the entering wedge of bribery; that there was evidence of votes being purchased, and enough evidence that, without these purchases, Caldwell could never have been returned; and therefore there was no election within the sense of the Constitution. Mr. Edmunds, and perhaps others, insisted that these acts of moral obliquity went to the qualifications or fitness of Caldwell, and therefore there was no election. Some said they would vote for expulsion, but would not vote for the resolution. Some leading democrats answered their fellows by saying that there was no question of States' rights in the matter; that the States had given to the Senate the right to judge of the elections, returns, and qualifications of its own members; and the exercise of judgment necessarily involved judicial discretion and interpretation of the Constitution.

This obliteration of party lines in the debate gave the action unusual judicial interest. It is to be observed that the resolution of Mr. Morton might be passed by a majority of a quorum, whereas expulsion could only be accomplished by a two-thirds vote. Before a vote, Mr. Caldwell resigned, and this ended the contest.

What is the
theory of
the Gov-
ernment?
16, 17, 28-30.

336. THEORY OF THE GOVERNMENT. It is a fit place to remark upon the theory of our Government, which was only occasionally glanced at in the debate.

All magistrates in America are directly or indirectly chosen by the people. The legislative magistrates in the States are all directly chosen by the same electors, although the Federal Constitution seems to contemplate that there might be a difference; and hence it provides that the Representatives in Congress shall be chosen by the same electors who choose the popular branches of the State Legislatures. But, as in practice, there has never been any difference, it results that the same State voters who choose the senators and representatives of the States, directly, choose the Representatives in Congress, and they indirectly choose the United States Senators and the President and Vice President. When, therefore, a member of the House presents himself, with the usual evidences of election, as a rule, he is seated; and, if there be a contest, the House afterwards determines his right to sit there. There are numerous precedents which go to the whole questions of elections, returns, and qualifications, such as, was there really a vacancy when the election was held? Was it held at the time and places and in the manner prescribed by law? Was it free? Did the voters possess the qualifications prescribed by the State constitutions and laws? Was there fraud, bribery, ballot-stuffing, false counting, corruption, or other malpractices which vitiate the election? And as extraordinary precedents, were the States and the

people in a condition to elect, or were they in hostility to the United States? The choice.

The precedents are not harmonious. And there are cases in which the House has gone behind the elections and returns to the moral fitness of the member returned, as in Whittemore's case.

The precedents in the Senate have not been so frequent, because there have been few contests. No case has gone back to the legal qualifications of the electors who returned the Legislatures who elected the Senators, though it is hard to see how a due respect to the people could deny that right. Cases have occurred where it was held that there was no vacancy when the Senator was chosen. Shields was denied his seat because he had not been nine years a citizen. Others have been refused because they could not take the test oath, which was a superadded qualification. Mental fitness and moral fitness have been questioned, and the cases referred to committees; and now, in the Louisiana and Alabama cases are raised the questions whether the Legislatures which returned the members were in fact the bodies elected by the people? Precedents in the Senate.
35.

To the author all precedents of mere practice are very inferior to the great question of the true theory of the Government. That theory is, that the Government is one of the people, as contradistinguished from the magistrates of their immediate choice. Among the powers confided to the State Legislatures is the right to choose, in joint convention of the houses, United States Senators for six years. There is a sort of extreme theory that these Senators are ambassadors to represent the sovereignty of the States, whatever that may be; that they have no direct responsibilities to the people, and are in no manner bound by the instructions of the Legislatures. But they are not ambassadors, but representatives of the people, by whom they are indirectly chosen, and as to the appointing and treaty-making power, they are privy counsellors of the President. Physically they are not subject to the will of the people, nor are members of the House, nor of the State Legislatures, nor the President, nor judges, nor any other magistrate, however chosen. But if the republic is to be preserved and revolutions avoided, all magistrates must return to first principles, and responsibility to the people must be acknowledged. What are the responsibilities to the people?
30

There is no physical power to control the presidential electors. Indeed, the original theory of the Constitution contemplated perfect freedom of choice by the electors, who may be chosen by the State Legislatures, by the people, by a quorum, or a less number of those chosen by the people, by the clergy, the laity, or any infinitesimal part of either to whom the States confide the power. That is the theory of the Constitution, and its further theory is, that these electoral colleges, chosen in such a manner as the States shall

The precedent.

prescribe, will not elect; and the ultimate choice will be referred to the States, who would vote as equals in the House, through their direct representatives of the people. But again: the people have no physical and often little moral control over these representatives. And, in precedents, all these theories of the Constitution have proved unsafe. In the effort to resume the powers which have been delegated through indirect machinery, the National Conventions assume the responsibility of nominating candidates, whom the people believe they ratify at the polls.

What control is there over the electors?

An attempted appeal from one popular choice involved the country in a terrible civil war, all the consequences of which no man is yet able to prophesy.

The Constitution has delegated to no magistracy the right to determine the elections, qualifications, and returns of the presidential choice. Yet it will be seen in another note that it is being exercised and has been exercised by the two Houses of Congress; and such an exercise, upon technical grounds, might defeat the popular will. The deliberation seems to be to find a constitutional mode of revising the choice of magistrates, when such a choice was not fairly made, or for any reason was not fit to be made. Every remove from the people seems only to complicate matters. Hence our tenure-of-office laws, civil-service regulations, and every restriction upon appointment and removal. And as a consequence of no appeal we have the disgraceful scenes of purchasing senatorial seats and other high offices with money and other influences. The vast increase of wealth and concentrated monopolies enable the designing to go down to the very fountains of power, and to influence, if not to control, popular choice. But these influences are naturally still more potent where it is left to one magistrate or one set of magistrates to choose others. Were Senators chosen directly by the people, the employment of corrupting influences would be greatly diminished, and were the great body of federal magistrates chosen by the people, there would be less motive for corruption.

What of contests in the House?

337. CONTESTS IN THE HOUSE. *Frauds in naturalization.* Where great frauds in the manufacture of naturalization papers were proved, and also fraud in the elections, Congress heard proof to purge the polls, and excluding the illegal voting, as far as possible, on both sides, changed the result and gave the seat to the sitting member. Van Wyck v. Greene, 40th Cong., 2d sess., Report No. 22, Feb. 3, 1870.

What may the House determine?

338. SOME GENERAL RULES. The House can only determine whether the election has been held in accordance with law, whether the party chosen has the constitutional qualifications, and whether the returns have been legally made. Perkins's Case, Contested Elections, 144.

The House may go behind the certificates and count all legal votes. *Christman v. Anderson*, 3 Contested Elections, (14 June, 1860,) 328; 42 Congressional Globe, 3075-7, 3079, 3127, 3131.

Gross frauds will not be overlooked, (*Boileau's Case*, Parsons' Select Cases, 503,) nor a reckless disregard nor criminal carelessness in regard to the election laws. *Id.*, 3 Contested Elections, 158, 159; *Sleeper v. Rice*, *Id.*, 472.

The party contesting on the ground of illegal votes ought to state the names of the illegal voters. *Varnum's Case*, 1 Contested Elections, 112; *Easton v. Scott*, 1 Contested Elections, 272; *Wright v. Fuller*, 3 Contested Elections, 161. But the objection to the notice should be made before the party appears and examines. *Otero v. Gallegos*, 3 Contested Elections, 178. It is not necessary to specify all the names. *Vallandigham v. Campbell*, 3 Contested Elections, 223.

339. WHAT THE NOTICE SHOULD SPECIFY. The first class of defective notices give no notice of any particular facts to be proved or disproved. *Skerrett's Case*, 2 Pars., 509; same case, *Brightly's Contested Elections*, 320, 324. The statute is, "and in such notice he shall *specify particularly* the grounds of his contest." (9 Stat. at L., 563, § 1; 1 *Brightly's Dig.*, 254.) To specify particularly is to set forth cause, manner, and instrument; when, where, and how much; the illegalities, frauds, or irregularities which will, in fact, be notice of the facts to be proved, as having happened in relation to certain counties and precincts. The provision is merely an affirmation of what the law aforetime was. *Leib's Case*, *Clark and Hall*, 165; *Luthrel v. Hume*, 4 Doug. Election Cases, 25; *Skerrett's Case*, 2 Parsons, 507; *Carpenter's Case*, same, 537; *Kneass's Case*, 2 Parsons, 553, and section 9 of the statute of the same restricts the parties to the proof or disproof of the facts alleged and denied. 1 *Brightly*, 255, § 21.

The rule as to elections everywhere is that the things intended to be proved should be stated with such certainty as to give the contestant's opponent reasonable notice, and to enable the House to judge whether the facts, if true, be sufficient to vacate the seat or to establish the right to retain it. *Leib's Case*, 1 Contested Elections, 165; *Eastwood v. Scott*, 2 Contested Elections, 272; *Kline v. Verree*, 1 Bartlett's Contested Elections, 381; *Delano v. Morgan*, *Digest of Elections*, 177; S. C., 1 Bartlett, 168. In this latter case, Mr. Dawes defines the too general notice of the contestant with precision: "You were not elected; I was." "You did; I didn't." "I will prove intimidation," &c., (p. 177.) The rule of Mr. Dawes goes further, and upon exhaustive authorities it is shown that the contest must be in accordance with the law, and upon grounds known to the law. *Id.*, 178.

What of
mere ir-
regulari-
ties?

340. MERE IRREGULARITIES—OATH OF OFFICERS. If the returning officers neglect to be sworn, the votes will not count. *McFarland v. Purviance*, and same *v. Culpepper*, Contested Elections, 131, 221; S. C. C., L. & H., 221; *Easton v. Scott*, Id., 272; *Draper v. Johnston*, Id., 702; *Otero v. Gallegos*, 3 Contested Elections, 182, 183; S. C., Bartlett, 177.

But in addition to the mere failure of the officers to take the required oath, there must be such evidence of fraud and misconduct on the part of the judges as to taint the whole proceeding and to render it uncertain what the result was. *Mann v. Cassidy*, *Brewster*, Penn., 11; *Draper v. Johnson*, 2 Cong. Contested Election Cases, 701; *Blair v. Barrett*, 3 Contested Election Cases, 1 Bartlett, (1840,) 313-315; *Knox v. Blair*, (5 May, 1864,) Id., 521. The case of *Blair v. Barrett* was an interesting case, and will be found in the *Globe*, vol. 41, pp. 2645, 2649, 2761, 2766, 2767, and Appendix, 445, and vol. 42, p. 395.)

What gen-
eral prin-
ciple is
usually
adopted?

341. GENERAL RULE. The general rules as to mere irregularities have been decided in many exhaustive judicial cases, and certainly such precedents ought to have great influence.

The general principles of law may be thus stated: Mere irregularities will not exclude election returns, when there is no suspicion of unfairness, and when there is no reason to believe that such irregularities have in anywise affected the result of the election. *Ex parte Heath*, 3 Hill, 44; *Ex parte Murphy*, 7 Cow., 153; *The People v. Vail*, 20 Wend., 12; *The People v. Stevens*, 5 Hill, 627; *Truehart v. Addicks*, 2 Tex., 222. And the same principles exhausted in *The People v. Cook*, 14 Bailey, 285; S. C., 4 Seld., 70, (8 N. Y., 67,) which case is cited and approved in *McKinney v. O'Connor*, 26 Tex., 12.

Thus, the failure in the returning officer to add up the returns of the different precincts is immaterial. *Id certum est quod certum redi potest*. When the complaint is a failure to return votes, it must clearly appear that such votes would change the result. (*Ex parte Heath*, 3 Hill, 44.) To warrant setting aside the election, it must appear affirmatively that the successful ticket received a number of improper votes which, if rejected, would have brought it down to a minority. (*Ex parte Murphy*, 7 Cow., 154; *The People v. Vail*, 20 Wend., 15; *Truehart v. Addicks*, 2 Tex., 222, 223.)

So, where a statute requires an act to be done by an officer within a certain time, for a public purpose, the statute shall be taken to be merely directory; and though the officer neglect his duty by allowing the precise time to go by, if he afterward perform it, the public shall not suffer by the delay. *Ex parte Heath*, 3 Hill, 47; *The People v. Works*, 7 Wend., 486, 487; *Colt v. Eves*, 12 Conn., 243, 253, 255; *Truehart v. Addicks*, 2 Tex., 224

The principle was fully discussed in *Carpenter v. Ely*, 4 Wisconsin, 420; same case, *Brightly's Contested Elections*, 258. Judge Cole reviews statutes and cases of Attorney General *v. Barstow*, 4 Wisconsin, 567; *People v. Van Slyck*, 4 Cowen, 322; *Ex parte Heath*, 3 Hill, 42; *People v. Stevens*, 5 Hill, 616; and he concludes: "For it is the election by a plurality of votes which constitutes the right to an office, and that right cannot be defeated by the mistake, negligence, or misconduct of the canvassing boards. Attorney General *v. Barstow*, 4 Wisconsin, 567; *People v. Vail*, 20 Wend., 12; *Ex parte Heath*, 3 Hill, 42; *Brightly's Contested Elections*, 261, 262. And see the learned note of Brightly, pp. 265-268. The same principle is very clearly reasoned in *Boileau's Case*, in Pennsylvania, 2 Parsons, 503; same case, *Brightly's Contested Elections*, 268; and in *Sterrett's Case*, *Brightly's Contested Elections*, 324, 325.

The whole subject is completely exhausted in *The People v. Cook*, 8 New York, 67; *Brightly's Contested Elections*, 423. It holds that where the pleadings raise a question of fraud in relation to the acts of a board of election officers, and the election goes only to show an irregularity without fraudulent intent, the court is not bound to submit it to the jury as an open question; that fraud, when imputed to the acts of inspectors of election, implies an illegal and wrongful act purposely committed; that an irregularity in conducting an election which does not deprive a legal voter of his vote, nor admit a disqualified person to vote, if it cast no uncertainty on the result, and have not been occasioned by the agency of a party seeking to derive a benefit from it, may be overlooked in a *quo warranto*; that the county board has no right to reject a return which is regular on its face, and delivered to the proper officer within the time prescribed by law; that the hour of closing the polls is directory, not imperative. Thus, on pages 437, 438, (*Brightly*,) it was said that the failure of the inspectors or clerks to take any oath, or their taking an irregular oath, was no objection. (*Cow. and Hill's Notes*, 705; the same, 1503; *Cady v. Norton*, 14 Pick., 236; *Commonwealth v. Buzzell*, 16 Pick., 153.) If the officers were *de facto*, it is sufficient; and if there were irregularities, the question is, what was the true state of the vote? And that the failure of the inspectors, who were not appointed but acted, to take the required oath, did not vitiate their rights as to third persons, is supported by the case of *McFarland v. Purviance*, 1 Cong. Election Cases, 131; *McFarland v. Culpepper*, *Ibid.*, 221; and *Draper v. Johnston*, *Ibid.*, 702. And that the county judges have no right to reject a certificate of the canvassing board which is fair on its face; that the hour of closing and opening the polls is not of the essence of law, but only directory. *Brightly*, 444, 445. And, finally, the opinion concludes that it may be safely affirmed that "if the irregularity do not deprive a voter of his right,

The right to office.

The People
v. Cook.

nor admit a disqualified person to vote; if it cast no uncertainty on the result, and have not been occasioned by the agency of the party seeking to derive a benefit from it, it may be overlooked, where the issue is as to which candidate received the greater number of votes for a particular office at a given election." (Philips v. Wickham, 1 Paige, 590; People v. Cook, Brightly, 447.) And this doctrine is sustained by The People v. Schemerhorn, 19 Barb., 540; The Commonwealth v. Meeser, 44 Pa. State R., 343; Juker v. Commonwealth, 20 Pa. State R., 493; Thompson v. Ewing, 1 Brewster, 107. And, in Illinois, it is held that the statutory rules are directory merely, not jurisdictional or imperative. Piatt v. The People, 29 Ill., 72. And so in New Jersey. Hardenburgh v. Farmers and Mechanics' Bank, 2 Green's Ch., 68. So, indeed, in all the States, according to the learned note of Mr. Brightly, in his book on Contested Elections, pages 448 to 454, which concludes thus: "It is, of course, no objection to an election that illegal votes were received, or legal votes rejected, if they did not change the majority." Sudbury v. Strauss, 21 Pick., 148; Blandford v. Gibbs, 2 Cush., 39; Christ Church v. Pope, 8 Gray, 140; *Ex parte* Murphy, 7 Cow., 153; State v. Lehre, 7 Rich., 234; McNeely v. Woodruff, 1 Green, 352; People v. Cicott, 16 Mich., 295; People v. Tuthill, 31 New York, 550; Matter of Chenango Insurance Co., 19 Wend., 635.

Repeat the
rule as to
the right to
judge?

342. EXCLUSIVE RIGHT TO JUDGE. The practice is liberal in regard to the personal rights of candidates and the constitutional rights of constituencies. Wright v. Fuller, 2 Contested Elections, 154; Daily v. Eastbrook, *Id.*, 304. For "each House is to judge of the elections, returns, and qualifications of its own members," and no previous House and Senate (much less the canvassing officers of the State or States themselves) can judge for them. The rights of the electors should not be compromised for the laches, if any exist, for which they are not responsible. It is more important that their voice should have expression in the House, through their lawfully-elected Representative, than that this or that man should enjoy the emoluments of office. Williamson v. Sickles, 2 Contested Elections, 209. It is a great public injury where the voters of the district are the real parties. Vallandigham v. Campbell, 2 Contested Elections, 230. The question is not what the parties or the officers have done or omitted to do, but what was the expressed wish of the people at the polls. Chapman v. Ferguson, 2 Contested Elections, 230; Wallace v. Simpson, Digest of Election Cases, 556. There is here no element of the fraud which brings the case within the Pennsylvania rule, adopted in Covode v. Foster. Digest of Election Cases, 602, 603. The same general rules have been repeatedly adopted by the Committee on Elections of the House. Perkins's Case,

Contested Elections, 144. Thus, if the complaint be the failure of the election officers to take the required oath, there must be such evidence of fraud and misconduct on the part of the judges as to taint the whole proceedings, and to render it uncertain what the result was. *Mann v. Cassidy*, Pennsylvania case, Twenty-second Congress, Contested Election Cases, 701; *Blair v. Barrett*, 3 Contested Election Cases, (1840,) 313-315; *Knox v. Blair*, (5 May, 1864,) 3 Contested Election Cases, 521. The debate in *Blair v. Barrett* was interesting and exhaustive, and the debate will be found in the *Globe*, vol. 41, pp. 2645, 2646, 2649, 2677, 2761, 2766, and Appendix, 445, and vol. 42, p. 395.

Oath of the officers.

So the charge that a party received "a majority of legal votes" goes for nothing unless he specify *who* were the illegal voters, and the grounds of illegal voting. *Vardeman's Case*, Contested Elections, 112; *Easton v. Scott*, Contested Elections, 272; *Wright v. Fuller*, 3 Contested Elections, 161.

Mere neglect to perform directory requirements will not vitiate the election. *Skerrett's Case*, 2 Parsons, 509.

Unless there be harm or bad faith. *Thompson v. Ewing*, 2 Parsons, 107. Not even careless ignorance or willful neglect. *Weaver v. Given*, Parsons, 144. And to the same effect, and that fraud will not be presumed, see *Goggin v. Gilmer*, Contested Elections, 70; *Littell v. Robbins*, *ib.*, 138; *Whyte v. Harris*, *ib.*, 263.

Nor will mere irregularities in not swearing officers as required by statute vitiate the election. *Blair v. Barrett*, Contested Election Cases, 311; *Milliken v. Fuller*, *ib.*, 176; *Covode v. Henry*, No. 15, part 2, 41st Cong., 2d sess., pp. 3, 4.

The same general precedents were adopted in *Giddings v. Clark* and *Niblack v. Wall*, in 1872. All objections to mere irregularities were overruled.

Presumptions are in favor of the qualifications of voters and the correctness of the acts of officers until the contrary is proved. *Goggin v. Gilmer*, 3 Contested Elections, 70; *Botts v. Jones*, *Id.*, 73.

The election statutes are but directory. *Brockenborough v. Cabell*, 3 Contested Elections, 79; *Easton v. Scott*, Contested Elections, 281; *Blair v. Barrett*, 3 Contested Elections, 313.

Where votes are given by *ballot*, an elector cannot be compelled to disclose the name of the candidate for whom he voted. *Easton v. Scott*, Contested Elections, 272; *Otero v. Gallegos*, 3 Contested Elections, (10 May, 1856,) p. 183. And if the judge open the ballots, proclaim the vote, and have it recorded, thus in fact conducting the election by ballot, such a precinct will be rejected. *Otero v. Gallegos*, 3 Contested Elections, 183.

Ballot.

A party must substantiate his charge of fraud before he can have a recount of the votes. *Kline v. Myers*, (22 June, 1864,) 3 Contested Elections, 574.

What of
the re-
turns?

343. "RETURNS." The election was held during the rebellion, and after Tennessee had seceded, on the day appointed for elections in that State. Maynard and Clements received votes in their respective districts, which the sheriffs and the governor refused to certify: *Held*, that they were entitled to their seats. Clements' Case, 3 Contested Elections, 366. But see the case of Upton, Id., 368. This and Beach's case hold that the election must have been held in accordance with the laws of Virginia. Id., 391. And see Legare's Case, who was admitted. Id., 415. And Foster's case. Id., 424.

Can a gov-
ernor recall
his certifi-
cate?

344. POWER TO RECALL CERTIFICATE. The governor of Nebraska Territory gave the certificate to Mr. Morton, but, upon the ground of discovered fraud, revoked it and gave a second certificate to Mr. Daily. The House decided that Mr. Daily should occupy the seat pending the contest. Morton *v.* Daily, 3 Contested Elections, 402. And the governor's view being sustained upon the facts, Mr. Daily retained his seat. Id., 414.

What was
the New
Jersey
case?

THE GREAT NEW JERSEY CASE. The notable features in this case are that the whig candidates produced the certificates of election from the executive of New Jersey. But it being known that this result was produced by the canvassers having excluded two townships because of irregularities, the clerk, upon calling the list for organization, refused to call the names of those thus commissioned. This caused two weeks' debate before the House was organized. After organization, without these five seats having been filled, the whole question was referred to the Committee on Elections. Pending the investigation the committee, by resolution, demanded a report as to who had the highest number of legal votes. Upon a partial report, the democrats were admitted, but the examination proceeded as in the case of a contest. Applying the usual rules as to the presumption of fairness of every vote, and the mode of proof where parties refused to testify as to how they voted; that is by proving the parties to which they belonged, the two excluded townships were counted, the polls purged, and the democrats seated. New Jersey Case, Contested Elections, 19-33; S. C., vol. 8, Congressional Globe, *passim*. A general charge of fraud, founded on hearsay evidence, should not be considered. Ingersoll *v.* Naylor, 3 Contested Elections, (1840,) p. 33.

Under this clause the House has the right to ascertain and decide upon all questions of law and fact, necessary to determine the right of each individual who may claim to be one of its members. Baker's and Norton's Cases, (26 Feb., 1847,) 3 Contested Elections, 93. Baker and Yell having accepted offices as commanders of volunteers, and been mustered in the army of the United States, their offices as members of Congress became vacated. 3 Contested Elections, 93. So

that a party may become disqualified while he is a member accepting another office. Abandonment of office.

The same principle was ruled in *Byington v. Vandever*, (11 April, 1862,) 3 Contested Elections, 395-402. But where the party became disqualified by accepting a military office after the election, and before he was qualified, the candidate who received the next highest number of votes is not entitled to the seat. *Byington v. Vandever*, 3 Contested Elections, 402.

345. "QUALIFICATIONS OF ITS OWN MEMBERS." Benjamin F. Whittemore, of South Carolina, was charged with the crime of selling a cadetship for money. He admitted the fact, but stated in extenuation that he used the money in his district for charitable purposes. The Military Committee reported a resolution for his expulsion. To avoid a vote Whittemore resigned. The House passed a resolution of censure, denouncing Whittemore as unfit for membership. The governor ordered an election to fill the vacancy, and Whittemore was re-elected. His credentials having been presented, the House, on 21 June, 1870, resolved not to admit him to membership. (House Journal, 18 and 21 June, 1870.) So here was a precedent which looked behind the mere constitutional qualifications, and to the character of the person chosen. It was claimed by Mr. Logan that the resolution of the House that Whittemore had been guilty of selling an appointment for money might be regarded as a conviction for an offense which rendered him infamous, and disqualified him from holding any office. But this was hardly the point on which the decision was made. The vote stood—for rejection, 121; against, 24. Can the House reject for other disabilities than the elections, qualifications, and returns?

346. DISABILITIES AND TEST OATH. On 22 March, 1869, the House passed the following resolution: What are the precedents about the test oath?

"*Resolved*, That in all contested election cases referred to the Committee of Elections, in which it shall be alleged by a party to the case or a member of the House that either claimant is unable to take the oath prescribed in the act approved July 2, 1862, entitled 'An act to prescribe an oath of office, and for other purposes,' it shall be the duty of the committee to ascertain whether such disability exists; and if such disability shall be found to exist, the committee shall so report to the House, and shall not further consider the claim of the person so disqualified without the further order of the House; and no compensation will be allowed by the House to any claimant who shall have been ineligible to the office of Representative in Congress at the time of the election, and whose disability shall not have been removed by act of Congress—"

242.

In *Sypher v. St. Martin*, the Committee of Elections reported that Louis St. Martin could not take the oath. H. Sypher's case?

Just
missed.

R. Rep., No. 11, 41st Cong., 1st sess., 6 April, 1869. Upon this report it was ordered to allow Mr. Sypher, the contestant, the seat. But the moment when the Speaker was about to administer the oath, a motion to reconsider prevailed, and the seat was declared vacant, thus establishing a precedent that where the member returned is disqualified because of inability to take the oath, the contestant shall not be seated, because he is wanting in votes.

There is a question whether the test oath is not imposing a disqualification not contemplated by the Constitution, which it was so ably shown the States could not do, in *Turney v. Marshall and Fouke v. Trumbull*, Contested Elections, 167.

What of
voting for a
disquali-
fied candi-
date?

In the case of the *King v. Hawkins*, 10 East., 211, Lord Ellenborough, in pronouncing the judgment of the King's Bench, said :

"The general proposition that the votes given for a candidate after notice of his ineligibility are to be considered the same as if the persons had not voted at all, is supported in the case of *King v. Withers*, and *Taylor v. Biggs*."

In the latter case all the judges held—

"That when electors vote for a person not qualified it is the same thing as if they had given no votes at all; in which case it is not disputed that silence was constructive consent."

In the case of *Rex v. Blissell*, upon a motion for a new trial, Lord Mansfield, addressing the counsel for the crown, who was arguing that the disqualification was not notorious, said :

"Do you doubt that if he is really disqualified, whether such disqualification is notorious or not, that the votes given for him are thrown away? In another jurisdiction, if the disqualification is notorious, it does more; it elects the other party, and of this you can have no doubt." *Vide Haywood's County Elections*, p. 533; *Wallace v. Simpson*, Ho. R., 41st Cong., 2d sess., No. 71, p. 1.

In the case of *King v. Parry*, 14 East., 549, it was ruled :

"When a candidate is disqualified for sitting in Parliament, and notice thereof is given to the electors, all votes given for such candidate will be considered thrown away, and the other candidate, with a minority of votes, will be in a position to claim the seat on proof of the existence of the disqualification."

The doctrine laid down in *Haywood on Elections*, and numerous cases there cited, is, "that voters must have notice of the ineligibility of the candidate, so that the voting for him is *willful obstinacy* and *misconduct upon the part of the voters*." In principle it seems not to be distinguishable whether the circumstances of disqualification be within the knowledge of the electors from its general notoriety, or whether it is

brought within their observation from actual notice." Male Notice. on Elections, p. 111.

In Cushing's Law and Practice of Legislative Assemblies, (p. 66,) it is said, after quoting the English decisions :

"In this country it is equally true that the election of a disqualified person is absolutely void, and in those States where a plurality elects, and where the votes are given orally, as in England, votes given for a candidate after notice of his disqualification are thrown away, and the candidate having the next highest number of votes is elected." Wallace v. Simpson, Id.

In the case of Wallace v. Simpson, Mr. Simpson admits, in his answer to the notice of contestant, that he "was a member of the General Assembly of South Carolina in the years 1858, 1859, and 1860; that he took the oath as such to support the Constitution of the United States; that he voted for the call of the convention which passed the ordinance of secession; that he entered the Confederate army, and served as a major and lieutenant colonel until the close of the year 1863, when he was elected to the Confederate Congress, and that he continued a member of said Congress until the close of the war; that he has engaged in open war against the United States, and, as a member of the Confederate Congress, he did all he could in an honorable way to advance the cause in which he was engaged." Wallace v. Simpson, Id., 4. The voters, by these public acts, were thoroughly informed of the ineligibility of Mr. Simpson, and they are presumed to have known of the disqualifying article of the Constitution of the United States. They are presumed to have known that he had been a member of the General Assembly of South Carolina; that he took an oath to support the Constitution of the United States as said member; and that he was a member of the Confederate Congress. These are presumptions of law which charge these electors with constructive notice.

Wallace v. Simpson.

"When the ineligibility of a candidate arises from his holding or having held a public office, the people within the jurisdiction of such office are held in law to know, and are chargeable with notice of such ineligibility." Vide Grant on Corporations, p. 109; Wallace v. Simpson, 41st Cong., 2d sess., Ho. Rep., No. 71, p. 3.

Ineligibility.

The weight of authority, reason, and the English cases are against counting the votes for a candidate so notoriously disqualified. Id.

347. INTIMIDATION. In the case of Harrison v. Davis, Contested Election Cases, vol. 2, which is probably the leading case upon the question, it is ruled "that if so many individuals were excluded by violence and intimidation as would, if allowed to vote, have given the contestant the ma-

What effect has intimidation?

Precedents.

majority, this would have been in law decisive of the case." This doctrine is conceded in the minority report in the recent case of *Hunt v. Sheldon*. But if we had no precedent, the committee would not hesitate to decide that where there was such violence and bloodshed as would intimidate men of ordinary firmness, and where a sufficient number of voters to have changed the result were kept from the polls by reason of this intimidation, it would be as fatal to the poll as if the election board had been controlled by intimidations. In the recent cases acted on by the House from Louisiana, it was contended that there was no violence used at the polls, and therefore there was no actual obstruction to a fair election. In this instance, according to the evidence, there was a conspiracy to prevent a free election. *Wallace v. Simpson*, Id.

The committee proceeded to enumerate the terrorism produced by the secret organization of which Simpson was a member, the murders and outrages perpetrated upon freedmen and Union men; the large numbers kept from the polls; the illegality in the mode of conducting the election, and from the facts conclude that but for these outrages Wallace would have been elected, and on page 15 conclude :

The conclusion.

"Under any one of the three views here presented Colonel A. S. Wallace is entitled to the seat, and, when all these propositions are united, we consider the claim as conclusively and unanswerably established. The committee, therefore, offer the following resolution :

"*Resolved*, That A. S. Wallace was duly elected a member of the Forty-first Congress from the fourth district of South Carolina, and is entitled to the seat he claims in this House."

Qualification of the rule.

But it has been held that intimidation and violence at the polls are not sufficient legal objection, unless such force was employed as was sufficient to arrest the election and prevent men of ordinary firmness from voting. *Harrison v. Davis*, 3 Contested Elections, (1861,) 341.

If the intimidation and violence be such as to prevent a fair election, it ought to be set aside, and referred back to the polls. *Bruce v. Loanduyesen*, 3 Contested Elections, 482; 52 Globe, 2156 to 2211.

On whom rests the burden of proof?

348. BURDEN OF PROOF. He who denies the *qualification* of a member holds the burden of proof, although a negative is to be proved. (Rogers' Law and Practice of Election Committees, 116.) The New Jersey Case, final report, 8 July, 1840, Contested Elections, 26. And the same is the rule as to voters. (3 Douglas, 219.) If a person of foreign birth be challenged, he shall prove his right to vote at the polls; if he vote without being challenged, the contestant who alleged the still existing alienage shall prove it. Contested Elections, 26.

² Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and, with the Concurrence of two-thirds, expel a Member.

What are the powers of the House over its own members?

349. "EACH HOUSE MAY DETERMINE THE RULES OF ITS PROCEEDINGS." The right claimed under this clause to expel the President. Senator Sumner, 3 Trial of the President, 250.

"PUNISH ITS MEMBERS FOR DISORDERLY BEHAVIOR." Nothing is said of the offense. Senator Sumner, 3 Trial of the President, 250.

What was Burdett's case?

The House of Commons of England punished Sir Francis Burdett (who was himself a member) for a libel against the House by imprisoning him in the tower of London. Sir Francis sued the speaker of the House, the sergeant-at-arms, and the lieutenant of the tower. They all pleaded justification under the order of the House, and the warrants of the speaker. The issues were made up, but the main point was ruled upon demurrer to the plea of justification by the speaker. *Burdett v. Calman*, 13 East., 27, (new edition, 7 East., 30;) *Burdett v. Abbot*, speaker of the House of Commons, 14 East., 1, 8, 11; Phila. Ed., vii, 1; S. C., 4 Taunton, 402; same cases in the House of Lords, 5 Dowl. Parl. R., 165. These cases exhaust the whole learning as to the privileges of members of Parliament. The point finally settled was that the House of Commons has the power of committing for contempt, and that a committing for a libel was a commitment for contempt.

The particular facts and circumstances out of which the contempt arose need not be set forth in the warrant. *Burdett v. Abbot*, 5 Dowl. Parl. R., 199.

"It is not pretended that the exercise of a general criminal jurisdiction is any part of their privileges." *Burdett v. Abbot*, 5 Howe Parl. Cases, 174.

Has the House general criminal jurisdiction?

Lord Holt said, in *The Queen v. Paty*, 2 Ld. Raymond, 1105, "he made no question of the power of the House of Commons to commit; they might commit any man for offering an affront to a member." But Lord Ellenborough said, "this must be understood as an affront to a member as such." And when Lord Holt said "they (the Commons) might commit for a crime," Lord Ellenborough said, "this I presume must be intended of a commitment for a crime in order to an impeachment; otherwise he would admit them to have a general criminal jurisdiction, which certainly he could not mean to attribute to them." *Burdett v. Abbot*, 14 East., Phila. Ed., vii, 356.

Not mem-
bers.

Pat. Woods'
Case.

Page 48.

Robert-
son's re-
port.

How was it
done?

PERSONS NOT MEMBERS. Since these notes were prepared, several cases have become precedents not yet notable in history, but not the less remarkable as an exercise of power. That of Patrick Woods passed off with very little comment, as well because of the brutality of the assault upon Mr. Porter, the insignificance of Woods, and the general fact that the great landmarks of individual liberty have been growing fainter and fainter. Woods assaulted Mr. Porter, a member of the House in the city of Richmond, Virginia, and struck him several violent blows. The parties were perfect strangers to each other, and there was no provocation for the assault. Woods was arrested and brought within the proper jurisdiction of a criminal court of Virginia. But, upon complaint to the Speaker, a warrant was issued, and Woods was brought to Washington. The case was referred to the Judiciary Committee of the House, which reported a resolution of contempt. Woods was not heard, as General Sam Houston had been for an assault upon a member on Pennsylvania Avenue. But, without hearing, W. was found guilty, and resolved into prison for a term extending beyond the session. The precedent is certainly one not to be followed.

The case of Patrick Woods did not escape Mr. Robertson, the author of that able work, Robertson's Practice. In the preface to the sixth volume of that work, he gives a history of that case, not the less meritorious as to the great principle, because it is weakened by the implied denial that Porter was a member of Congress.

"It appears from the Globe, p. 5422, that, on the 7th day of July, J. G. Blaine, Speaker of the House of Representatives, addressed to 'Nehemiah G. Ordway, Esq., Sergeant-at-arms,' a document reciting the resolution that Patrick Woods was in contempt, and telling Mr. O. he was required to execute it; and the latter made return that he had executed his warrant upon Patrick Woods by delivering him to the warden of the jail in the District of Columbia, together with a copy of that warrant, and the following further order:

"*To the Warden of the Jail of the District of Columbia:*

"SIR: Pursuant to the order of the United States House of Representatives, a true copy of which is hereto annexed, you are hereby required to receive Patrick Woods into the jail aforesaid, and him there detain for the full term of three months named in said order of the United States House of Representatives, and *you will not surrender said Woods to any authority except that issuing from said House of Representatives, until the expiration of his sentence*, without further orders.

N. G. ORDWAY,

"Sergeant-at-Arms U. S. House of Representatives."

"Under which are these words: 'I have this day received into the jail of the District of Columbia the above-named Patrick Woods.

JOHN S. CROCKER,

"Warden United States Jail,

"per D. B. MACK."

“In 1841–2, as to any legislative body other than a House of the British Parliament, the ablest British jurists (see 4 Moore’s P. C. C., 83, 88) concurred in holding that, according to the *common law*, the power of committing for a contempt, *not in the presence of the assembly*, is *not* incident to a local legislature. *Burdett v. Abbot*, 14 East., 137, cited in *Beaumont v. Barrett*, 1 Moore’s P. C. C., 76. This case being followed by another in 1858, (*Fenton v. Hampton*, 11 Moore’s P. C. C., 91,) was, in 1866, ‘taken to have decided conclusively that the legislative assemblies in the British colonies have, in the absence of express grant, (the case in 1864, of “despotism within a despotism,” turned upon the construction of the express grant.) *Dill v. Murphy*, 1 Moore’s P. C. C., (N. S.) 507, no power to adjudicate upon or punish for contempts committed beyond their walls.’

Robert-
son's
notes?

“Hence the action of trespass was maintained in 1858 against the Speaker of the House and the Sergeant-at-arms. 11 Moore’s P. C. C., 91. And, in 1866, against the Speaker and ten members of the House. 4 Moore’s P. C. C., (N. S.), 204, 207, 221.

“As to a local legislature, admitting that, ‘to the full extent of every measure which it may be really necessary to adopt to secure the free exercise of their legislative functions, they are justified in acting by the principle of the common law,’ ‘yet,’ said Parke, B., ‘the power of punishing any one for *just misconduct* as a contempt of its authority, and adjudicating upon the fact of such contempt, and the measure of punishment, as a judicial body, irresponsible to the party accused, whatever the real facts may be, is of a different character, and by no means essentially necessary for the exercise of its functions by a local legislature, whether representative or not. All these functions may be well performed without this extraordinary power, and with the aid of the ordinary tribunals to investigate and punish contemptuous insults and interruptions.’ *Keilly v. Carson, &c.*, 4 Moore’s P. C. C., 88.

“‘If a member of a colonial house of assembly be guilty of disorder by conduct in the house whilst sitting, he may be removed, or excluded for a time, or even expelled; but there is a great difference between such powers and the judicial power of inflicting a penal sentence for the offense. The right to remove for self-security is one thing, the right to inflict punishment is another. The former is, in their lordship’s judgment, all that is warranted by the legal maxim that has been cited, but the latter is not its legitimate consequence.’ ‘If the good sense and conduct of members of the colonial legislature prove, as in the present case, insufficient to secure order and decency of debate, the law would sanction the use of that degree of force which might be necessary to remove the person offending from the place of meeting, and to keep him excluded.’”

Citations.

"The same rule would apply *a fortiori* to obstructions caused by any person not a member. And whenever the violation of order amounts to a breach of the peace or other legal offense, recourse may be had to the ordinary tribunals. *Doyle v. Falconer*, 1 Moore's P. C. C., (N. S.,) 219. For the same text see *Speakes v. Glass*, 3 Moore's P. C. C., 560-573."

What was
the case of
Doyle v.
Falconer?

350. A GREAT CASE IN FAVOR OF LIBERTY. The case of *Doyle v. Falconer*, 1 Moore's Reports of Privy Council Appeals, is an opinion having so much of the ring of the old-fashioned notions of civil liberty, that the editor feels obliged to make the following long extract from it, which is entitled to the more respect, because the tribunal was composed of the most eminent lawyers of England.

"First. Does the house of assembly possess the authority which the pleas allege did always of right belong to it and to legislative assemblies in other parts of the dominions of Her Majesty, viz: An authority to commit and punish for contempts committed, and for interruptions and obstructions given to the business of the said house of assembly by its members or others in its presence and during its sittings?

"Secondly. Assuming the existence of this alleged authority to be established, were the warrants issued by virtue of it sufficient in law?

"The first question, affecting as it does the privileges of the legislative assemblies in many of the dependencies of the crown, is one of importance. When it first arose before this committee, in the case of *Beaumont v. Barrett*, (1 Moore's P. C. Cases, 59,) the learned judges then sitting decided broadly that the power of punishing contempts is inherent in every assembly that possesses a supreme legislative authority, whether they are such as are a direct obstruction to its due course of proceeding, or as such have a tendency indirectly to produce such obstruction; and, therefore, that the legislative assembly of Jamaica had the power of imprisoning for a contempt by the publication of a libel.

"Again, in America, the Supreme Court of the United States, a tribunal whose judgments are entitled to the highest respect, held, in the case of *Anderson v. Dunn*, 6 Wheat., 204, that the House of Representatives had, by necessary implication, a general power of punishing and committing for contempts, notwithstanding that the *lex scripta*, "the Constitution of the United States," had expressly conferred upon it a power limited to the punishment of contempts when committed by its own members.

"It is admitted that the case of *Keilly v. Carson*, 4 Moore's P. C. Cases, 63, which overruled that of *Beaumont v. Barrett*, and has been followed by that of *Fenton v. Hampton*, 11 Moore's P. C. Cases, 347, must here be taken to have decided conclusively that the legislative assemblies in the British colonies have, in the absence of express grant, no power to ad-

judicate upon or punish for contempts committed beyond their walls. The case is one which, having regard to the constitution of the committee before which it was argued for the second time, their lordships must accept as an authority of singular weight. And if the elaborate judgment which was then pronounced has in terms left open the question which is raised in the present case, it has stated principles which go far to afford the means of determining that question.

Want of
power to
punish.

“The privileges of the House of Commons, that of punishing for contempt being one, belong to it by virtue of the *lex et consuetudo Parliamenti*, which is a law peculiar to and inherent in the two Houses of Parliament of the United Kingdom. It cannot, therefore, be inferred from the possession of certain powers by the House of Commons, by virtue of that ancient usage and prescription, that the like powers belong to legislative assemblies of comparatively recent creation in the dependencies of the crown.

“Again, there is no resemblance between a colonial house of assembly, being a body which has no judicial functions, and a court of justice, being a court of record. There is, therefore, no ground for saying that the power of punishing for contempt, because it is admitted to be inherent in the one, must be taken by analogy to be inherent in the other.

“If, then, the power assumed by the house of assembly cannot be analogous to the privileges of the House of Commons or the powers of a court of record, is there any other legal foundation upon which it may be rested? It has not, as both sides admit, been expressly granted. The learned counsel for the appellants invoked the principles of the common law; and as it must be conceded that the common law sanctions the exercise of the prerogative by which the assembly has been created, the principle of the common law, which is embodied in the maxim, “*Quando lex aliquid concedit, concedere videtur et illud, sine quo res ipsa esse non potest*,” applies to the body so created. The question, therefore, is reduced to this: Is the power to punish and commit for contempts committed in its presence one necessary to the existence of such a body as the assembly of Dominica, and the proper exercise of the functions which it is intended to execute? It is necessary to distinguish between a power to punish for a contempt, which is a judicial power, and a power to remove any obstruction offered to the deliberations or proper action of a legislative body during its sittings, which last power is necessary for self-preservation. If a member of a colonial house of assembly is guilty of disorderly conduct in the house whilst sitting, he may be removed, or excluded for a time, or even expelled; but there is a great difference between such powers and the judicial power of inflicting a penal sentence for the offense. The right to remove for self-security is one thing, the right to inflict punishment is another. The former is, in

The Privy
Council
case.

their lordships' judgment, all that is warranted by the legal maxim that has been cited, but the latter is not its legitimate consequence. To the question, therefore, on which this case depends, their lordships must answer in the negative. If the good sense and conduct of the members of colonial legislatures prove, as in the present case, insufficient to secure order and decency of debate, the law would sanction the use of that degree of force which might be necessary to remove the person offending from the place of meeting, and to keep him excluded. The same rule would apply, *à fortiori*, to obstructions caused by any person not a member. And whenever the violation of order amounts to a breach of the peace, or other legal offense, recourse may be had to the ordinary tribunals. *Doyle v. Falconer*, 1 P. C. Appeals, 340.

"But their lordships, sitting as a court of justice, have to consider not what privileges the house of assembly of *Dominica* ought to have, but what by law it has. In order to establish that the particular power claimed is one of those privileges, the appellants must show that it is essential to the existence of the assembly, an incident "*sine quo res ipsa esse non potest.*" *Doyle v. Falconer*, 1 P. C. Appeals, 341.

Stewart's
case.

351. STEWART'S CASE. In *Stewart v. Blaine*, 1 McArthur's Reports of Appeals, by the Supreme Court of the District of Columbia, it was held that, if the House of Representatives had jurisdiction over the person and the subject matter, the Speaker and the Sergeant-at-arms, as ministerial officers of the House, were justified in committing and holding until the further order of the House. And Chief Justice Cartter said: "The question of power to punish (by the House, for contempt) was settled in *Anderson v. Dunn*, 6 Wheat., 204. This authority has been uniformly acquiesced in for over fifty years, and, until reversed, must be regarded as conclusive with this court."

What was
the case of
Anderson
and *Dunn*

352. ANDERSON AND DUNN. In *Anderson v. Dunn*, 5 Wheat., 235, Mr. Justice Johnson held that the Constitution gives no power to either House to punish for contempt, except when committed by its own members. Nor does the judicial or criminal power given to the United States in any part expressly extend to the infliction of punishment for contempt of either House, or any one coördinate branch of the Government. But it was said that Government could not exist without having the exercise of discretion somewhere; that the abuse of that discretion rests upon appeals to public approbation; that public functionaries must be left at liberty to exercise the powers which the people have intrusted to them; that the fact that the statutes give power to the courts to punish for contempts in certain cases does not exclude the idea that the power exists without the statutes, and may be exercised in other cases; that the argu-

ments of coördinate power in other branches of the Government, and that the power of the House is limited to its own walls, destroy the idea of implied power; that the argument of previous legislation and definite definitions within the District would lead to ridiculous absurdity; that by analogy "the least possible power adequate to the end proposed should be exercised, and the extent would be imprisonment during the session." (But even this limitation was violated in *Pat. Woods' case*.) It was also said that the order of the House and warrant of the Speaker are only limited by the boundaries of the United States.

Anderson
and Dunn.

But to the editor it has always seemed that the many valuable arguments noticed in *Anderson v. Dunn* were not answered. It is now an admitted maxim that there is no arbitrary power in the Government of the United States. All officers act under the Constitution and laws, and if their acts are not justified by these, there is no justification for them. Men cannot be tried for imaginary or undefined offenses, nor before tribunals other than those established by law. To hold that a single body of the House may first determine what is a contempt, and then punish it at discretion, and that its very action should afford justification, is to clothe a single branch of the legislature with greater power than both branches possess. For no one can justify a trespass under an unconstitutional law. Nor, indeed, is any act ever justifiable when the tribunal or officer acting had no power or jurisdiction to do the thing.

Objection
to it?

That Congress might pass a code for punishing contempts, and referring such cases to the judiciary (as has been attempted) is not denied. But that either House is a court, except in the defined cases, is denied.

It is to be hoped that the modifications of this doctrine of arbitrary power in England will awaken thought in America, and that appropriate legislation will be substituted for the caprice of committees and the respective branches of the Houses. But for this there is little solid hope, since the arbitrary principle in *Anderson v. Dunn* seems to be sustained by the following authorities. Speaking of that case, Kent says: "The decision of the Supreme Court is accompanied with a course of reasoning which would be sufficient to place the authority of either house of Congress to punish contempts and breaches of privileges on the most solid foundation, independent of the absolute authority of the decision. * * It is a power inherent in all legislative assemblies, and is essential to enable them to execute their great trusts with freedom and safety. * * What acts shall amount to a contempt of either House of Congress, are not defined, and must be left to the judgment and discretion of the house, under the circumstances of each case." 1 Kent Com., 7th ed., p. 250, n. a; see, also, *Story on Const.*, 4th ed., §§ 846-849; *Cooley's Const. Limitations*, 3 ed., p. 133; *Ex parte Nugent*, 1 Am.

For what
may mem-
bers be ex-
pelled?

Authori-
ties.

Law Jour., (N. S.) p. 107; Rawle on Const., pp. 47, 48; Sergeant's Const. Law, p. 354; Wickelhauser v. Willett, 10 Ab. Pra. Rep., 164. [And now comes the case of Hallet Kilbourn, another recusant witness, who refuses to disclose the names of the Washington real estate pool, and who, without debate or objection, has been imprisoned until the further order of the House.]

353. "EXPEL A MEMBER." In the case of Benjamin F. Whittemore, the Military Committee reported a resolution for his expulsion, for the crime of selling his cadetship to the Military and Naval Academy. After some debate the House adjourned, while Mr. Whittemore was entitled to the floor. When the resolution was reached the next day, the Speaker announced that since the adjournment yesterday he had received a copy of Whittemore's telegram to the governor of South Carolina tendering his resignation, and the governor's reply accepting the resignation; and therefore Speaker Blaine held that, in accordance with the case of Mr. Matteson, of New York, Mr. W. was no longer a member of the House, and was not entitled to speak. A good deal of debate ensued, and a test resolution was offered, by which it was decided, in effect, that pending the resolution for expulsion the member may resign, and thus oust the jurisdiction over him. See Journal and Debates in Whittemore's case, 40th Congress, 2d session.

But the editor believes this to have been an erroneous precedent. By the resolution and by the report of the committee the House obtained jurisdiction over the party and the offense. To allow a resignation was to defeat the jurisdiction of the tribunal, and is contrary to principle. The acceptance of the resignation by the governor was a matter of no consequence. His power is to order a new election where a vacancy exists. This may be created as well by exercising an incompatible office as by resignation or death. But had the House proceeded to expulsion, which it might have done, the difficulty growing out of a new election would not have been avoided. Preston Brooks, of South Carolina, was expelled for his assault upon Senator Sumner in the Senate chamber. He was elected to fill his own vacancy which thus happened, and he appeared and took his seat. The difference was really in the character of the offense. The question of power was not weighed as it was in Wilkes' Case, in the House of Commons.

The last effort at expulsion grew out of the Credit Mobilier investigation. The effort was to expel Ames for bribing members at a previous session. No member would admit that he had been bribed; nor was any member of the House who had received shares of the Credit Mobilier stock put upon his trial. The motion to expel Ames and Brooks, of New York, was voted down. In the Senate, however, Patterson, of New Hampshire, was expelled for participating in the same transactions. See Journals and Debates and Patterson's appeal (by Caleb Cushing) to the next Congress.

The reports of the investigating committee and the debates will become interesting reading after the political atmosphere shall become purer.

³ Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those present, be entered on the Journal.

What of the journal and yeas and nays?

Yeas and Nays.

⁴ Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

Page 88, notes 53-61. Page 87, note 51.

SECTION 6. ¹ The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony, and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

What is the compensation of members?

What are the privileges of members?

354. "RECEIVE A COMPENSATION FOR THEIR SERVICES." By the act of 3 March, 1873, (vulgarly called the salary-grab law,) the compensation of Senators and members was increased to \$7,500, and the act was made retrospective, so as to give the increased salary from the commencement of that long session. This raised such a storm in the country that many Senators and Representatives either refused to receive the increased compensation, or else, after having received it, returned it to the Treasury. Never was so much ink shed over one subject within any one year. At the next session of Congress the law was repealed, and it is now succinctly thus: Five thousand dollars per annum, and twenty cents for every mile of travel going and returning.

What is the compensation of Senators and Representatives?

355. "BE PRIVILEGED FROM ARREST." The defendant may be served with an original writ, summons, citation, or other process, to which he is duly required to plead; but he is not subject to arrest or to attachment for contempt.

What of the privilege from arrest?

Privilege. McKenna v. Sprague, Supreme Court of the District of Columbia, by Judge Wylie, 1868; Woolley v. Butler, Superior Court of the city of Baltimore, 1868; Gentry v. Griffith, 27 Tex. 462. This seems to have been the extent of the privilege under the acts of Parliament and the decisions in England prior to the adoption of our Constitution. St. 12 and 13 William III, chap. 3, (1700;) St. 10 Geo. III, chap. 50. The member of Parliament, if arrested, could make an attorney and be discharged. But it seems that the suit was not dismissed. Burdett v. Abbot, 14 East., 128; S. C., Phila. ed., 355; Benyon v. Evelyn, Bridgman's Rep., 324, 337; S. C., 14 Car. 5 Roll., 2558; 1 Tidd's Practice, 116, 117; 1 Bl. Comm., 162, 166. The doctrine is fully explained in Burdett v. Abbot, 14 East., 128; Philadelphia edition, 7 East., 351. An arrest is made by a corporal seizing or touching the defendant's body. 3 Black. Comm., 289; Wood's Institutes, 575; Legrand v. Bedinger, 4 Mon., 350. A restriction of the right of locomotion. Hart v. Flynn, 8 Dana, 190.

The definitions do not comprehend the service of a process, by which no imprisonment, no restraint of liberty, no bail is required, but only a notice or copy of process. Legrand v. Bedinger, 4 Mon., 350; Catlett v. Morton, 4 Litt., 123; Hart v. Flynn, 8 Dana, 190.

The exemption from being impleaded merely seems to have been given up. Donn v. Walsh, 4 Pryn's Parl. Writs, 743; Rivers v. Cozzins, Id., 755; Roo v. Sadcliff, 1 Hatsel, 51.

They are not privileged from the service of citation in civil cases. Gentry v. Griffith, 27 Tex., 462. But by the constitutions of Alabama, Arkansas, California, Indiana, Kansas, Missouri, Nebraska, Oregon, Wisconsin, and perhaps some other States, the members are exempt from the service of civil process while going to, remaining at, and returning from the Legislature; and so it ought to be everywhere. The House may order the release of members and the courts may relieve on *habeas corpus*. (Cushing Par. Law, §§ 546-597.) Cooley's Const. Law, 133, 134.

What are the disqualifications of Senators and Representatives?

² No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such Time; and no Person holding any Office under the United States shall be a Member of either House during his Continuance in Office.

What is the effect of the military office?

356 "AND NO PERSON HOLDING ANY OFFICE UNDER THE UNITED STATES SHALL BE A MEMBER OF EITHER HOUSE DURING HIS CONTINUANCE IN OFFICE." The ac-

ceptance of a military appointment as a colonel of volunteers, and being mustered into the army of the United States, although the officer was commissioned by the governor, was holding an office under the United States, which vacated the seat in Congress, and the governor had the right to assume that there was a vacancy and order an election. Cases of Baker and Zell, 3 Contested Elections, 92-96. Speeches of Mr. Cattel and Mr. Schenck, published in the same place. This principle was affirmed in *Byington v. Vandever*, 3 Contested Elections, (11 April, 1862,) pp. 395, 400, 402.

In the contest of *Bowen v. De Large*, after the House got jurisdiction of the matter, Bowen was elected to the Legislature of South Carolina, and served a part or the whole of a session. Paschal moved, before the committee, to dismiss the contest, on the ground that the offices of State legislator and member of Congress are incompatible, and the acceptance of the former is an abandonment of the latter. But Bowen, either after or before the motion was made, resigned his seat in the Legislature, and the committee overruled the motion. A Representative does not become a member until he takes the oath of office, therefore he may lawfully hold any office after his election and until that time. 14 Op., 408.

SECTION 7. ¹All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments, as on other Bills.

²Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States. If he approve, he shall sign it, but if not, he shall return it, with his Objections, to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons

Where shall the bill for raising revenue originate? Page 90, note 64, 65. Define what is called the veto power. Page 91, notes 66-69.

Yeas and
nays.
If the bill
be not re-
turned?

voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the same shall be a Law, in like manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which case it shall not be a Law.

What ac-
tion should
be taken
immediate-
ly?

357. "EVERY BILL WHICH SHALL HAVE PASSED THE HOUSE OF REPRESENTATIVES AND THE SENATE, SHALL, BEFORE IT BECOME A LAW, BE PRESENTED TO THE PRESIDENT OF THE UNITED STATES; IF HE APPROVE HE SHALL SIGN IT, BUT IF NOT, HE SHALL RETURN IT, WITH HIS OBJECTIONS, TO THAT HOUSE IN WHICH IT SHALL HAVE ORIGINATED," &c. When the bill is returned with the President's objections, it is usual to have the message *immediately* read. Journals 1 sess., 28 Cong., pp. 1081, 1084; 1 sess., 29 Cong., 1209, 1214; 2 sess., 33 Cong., pp. 397, 411; 1 sess. 34 Cong., p. 1420. And for the House to proceed to the reconsideration of the bill. *Ib.* Or to postpone its reconsideration. House Journal, 1 Sess. 21 Cong., p. 742. And the message and bill may be referred to the appropriate committee, and postponed until the next session of the same Congress, as in the case of Best and Wallace, (42 Cong., 2 session, Senate Journal,) which were referred and reported at the 3d Session. H. R. Rep. No. 42.

Action shall not be taken where less than a quorum is present. 1 sess., 33 Cong., House Journal, p. 1341.

A veto message and bill may be referred, or the message alone, and the bill laid on the table. Journal, 2 sess., 27 Cong., pp. 1253-1257; Globe, same day, p. 1218.

What is the
question to
the House?

The main question is, "Will the House on reconsideration agree to pass the bill?" House Journal, 2 sess., 27 Cong., p. 1051; 1 sess., 28 Cong., p. 1085; 1 sess., 29 Cong., p. 1218; Barclay's Digest, 214.

Is the con-
sideration
a privi-
leged ques-
tion?

The Speaker said "the motion to proceed to the consideration of a vetoed bill, with the objections of the President, is a privileged question under the Constitution." And the Houses sustained the Speaker by vote. Cong. Globe, 2 sess., 27 Cong., p. 905; 2 sess., 28 Cong., p. 396; Barclay's Dig., p. 215.

A vote on the passage of a vetoed bill cannot be reconsidered. Cong. Globe, 1 sess., 28 Cong., pp. 672, 677; same sess., 1093-1098.

Where the President does not approve a bill, and is prevented by the adjournment of Congress from returning it with his objections, it is usual for him to inform the House

wherein it originated, at the next session, of his reasons for not approving it. Journal, 2 sess., 12 Cong., p. 544; Id., 1 sess., 30 Cong., p. 82; Id., 2 sess., 35 Cong., p. 151; Barclay's Dig., 215.

³Every Order, Resolution, or Vote, to which the Concurrence of the Senate and House of Representatives may be necessary (except on a Question of Adjournment,) shall be presented to the President of the United States; and, before the same shall take Effect, shall be approved by him, or, being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

What order, resolution, or vote must be submitted to the President?

SECTION 8. The Congress shall have Power—

¹To lay and collect Taxes, Duties, Imposts, and Excises to pay the debts and provide for the common Defense and general Welfare of the United States; but all Duties, Imposts, and Excises shall be uniform throughout the United States;

What are the powers of Congress?

²To borrow Money on the Credit of the United States;

³To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

Commerce?

⁴To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

Naturalization?
Bankruptcy?

⁵To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

Coins?
Weights and measures?

⁶To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

Counterfeiting?

⁷To establish Post Offices and Post Roads;

Post offices?

⁸To promote the Progress of Science and useful

Patents

- and copy-
rights? Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;
- Inferior
tribunals? ⁹To constitute Tribunals inferior to the Supreme Court;
- Crimes? ¹⁰To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations;
- War, &c. ¹¹To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;
- Armies? ¹²To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;
- Navy? ¹³To provide and maintain a Navy;
- Rules? ¹⁴To make Rules for the Government and Regulation of the land and naval Forces;
- Militia? ¹⁵To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections, and repel Invasions;
- Organizing
militia? ¹⁶To provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States, respectively, the Appointment of the Officers, and the Authority of training the Militia, according to the Discipline prescribed by Congress;
- The federal
District
and forts
and arsen-
als? ¹⁷To exercise exclusive Legislation in all Cases whatsoever over such District (not exceeding ten Miles square) as may, by Cession of particular States and the Acceptance of Congress, become the Seat of the Government of the United States; and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the same shall be, for the Erection of Forts, Magazines,

Arsenals, Dock-yards, and other needful Buildings; Arsenals.
and

¹⁸To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

General power?

358. "CONGRESS SHALL HAVE POWER TO LAY AND COLLECT TAXES, DUTIES, IMPOSTS, AND EXCISES." More comprehensive words could not have been used. *Veazie Bank v. Fenno*, 8 Wall., 540. The rule is, that the power of taxation is concurrent in the two governments. The States cannot tax the instrumentalities of the United States, or its securities, and the supplies procured by contractors. But it may tax the property of such persons situated in the State. Thus it may tax the stock of the Pacific railroad, to which the United States contributed for building. *Railroad Company v. Peniston*, 18 Wall., 29.

What are the respective powers of the government to tax?
p. 94, n. 71-77.

Taxes do not come within the ordinary definition of debts for which actions may be maintained. (1 Black. Com., 475, 476; *Pierce v. Boston*, 3 Met., 520; *Shaw v. Pickett*, 26 Vt., 486; *Camden v. Allen*, 2 Dutcher, 398.) The collection of taxes is a proceeding in *invitum*. The legal-tender act only meant such debts, "public and private," as are founded upon contract, not taxes. (*Perry v. Washburn*, 20 Cal., 320.) *Lane County v. Oregon*, 7 Wall., 80.

Are taxes debts?

The power must not be so exercised as to impair the separate existence of the governments. (*Lane County v. Oregon*, 7 Wall., 73.) The question of power belongs to Congress, not the courts. *Veazie Bank v. Fenno*, 8 Wall., 548; *Lane County v. Oregon*, affirmed; *Railroad Co. v. Peniston*, 18 Wall., 29.

What are the limitations of the powers of the States?

The power of taxation by a State is limited to persons, property, or business within its jurisdiction. *Railroad v. Pennsylvania*, 15 Wall., 319. Personal property may be separated from the person for the purposes of taxation, such as national bank stock. Uniformity or equality is the cardinal principle. *Breman County v. Railroad Co.*, 44 Ill., 238. Uniformity in assessment being reached, the mode of collection may be varied. *Tappan v. Merchants' National Bank*, 19 Wall., 499-505.

The States have the power to tax the shares of stockholders in the national banks. *National Bank v. Kentucky*, 9 Wall., 356, 361.

359. TAX. Congress cannot tax to the destruction of the States, nor the States to the hindrance of the National Government. *Railroad Company v. Peniston*, 18 Wall., 31.

How far may the instrumentalities

of govern-
ment be
taxed?
72.

Power to tax, with certain exceptions, resides with the States, independently of the Federal Government, and that power, when confined within its true limits, may be exercised without restraint from the federal authority. Outside of the prohibitions, the power of the State to tax extends to all objects within the sovereign power of the States, except the means and instruments of the Federal Government.

Ships, as property merely, are not within any inhibition, and are taxable by the States. (*Nathan v. Louisiana*, 8 How., 82; *Howell v. Maryland*, 3 Gill., 14; *Passenger Tax Cases*, 7 How., 402; *Hays v. Pacific Mail Steamship Company*, 17 How., 598.) That power reaches all property, if there be no restriction in the Constitution and no restraining act between the Union and the States, unless the thing taxed be denominated instruments or means of the Federal Government. (*McCulloch v. Maryland*, 4 Wheat., 429; *Society for Savings v. Coite*, 6 Wall., 604; *Brown v. Maryland*, 12 Wheat., 448; *Weston v. Charleston*, 2 Pet., 467.) *State Tonnage Tax Cases*, 12 Wall., 212, 213, 224.

What is the
public
debt?
Note 97.

360. "TO PAY THE DEBTS * * * OF THE UNITED STATES."

Statement of the public debt of the United States for the month of November, 1875.

78.

Aggregate of debt bearing interest in coin—registered, \$768,928,700 00; coupon, \$925,322,600 00; total, \$1,694,251,300 00; interest due and unpaid, \$7,990,424 88; accrued interest to date, \$26,235,479 05.

Aggregate of debt on which interest has ceased since maturity—total, \$22,430,870 26; interest due and unpaid, \$539,377 75.

Aggregate of debt bearing no interest—total, \$477,304,084 51; interest due and unpaid, \$20,234 84.

Recapitulation: Debt bearing interest in coin—bonds at 6 per cent., \$1,033,866,550 00; bonds at 5 per cent., \$660,384,750 00. Debt bearing interest in lawful money—navy pension fund at 3 per cent., \$14,000,000 00. Debt on which interest has ceased since maturity, \$22,430,870 26. Debt bearing no interest—old demand and legal-tender notes, \$372,541,479 50; certificates of deposit, \$42,610,000 00; fractional currency, \$42,356,105 01; coin certificates, \$19,796,500 00; unclaimed interest, \$20,234 84. Total debt, principal and interest, \$2,242,946,771 29.

By cash in the Treasury—coin, \$70,404,676 38; currency, \$12,014,962 34; special deposit held for redemption of certificates of deposit as provided by law, \$42,610,000 00. Total, \$125,029,638 72.

Debt, less cash in the Treasury December

1, 1875..... \$2,117,917,132 72

Debt, less cash in the Treasury November	
1, 1875.....	2,118,397,211 40

Decrease of debt during the month.....	\$480,078 83
--	--------------

Decrease of debt since June 30, 1875.....	\$10,771,593 57
---	-----------------

Bonds issued to the Pacific Railway Companies, interest payable in lawful money—principal outstanding, \$64,623,-512 00; interest accrued and not yet paid, \$1,615,587 80.

By a decision of the Supreme Court, the United States cannot charge its whole transportation account to the Union Pacific railroad, but only half thereof; therefore all of these bonds are properly chargeable as part of the public debt. *Union Pacific Railroad v. The United States*, (October Term, 1875,) 1 Otto, 000.

Pacific rail-
road bonds.

361. “TO BORROW MONEY ON THE CREDIT OF THE UNITED STATES.” The question presented for our determination by the record in this case is whether or not the payee or assignee of a note made before the 25th of February, 1862, is obliged by law to accept in payment United States notes equal in nominal amount to the sum due according to its terms when tendered by the maker or other party bound to pay it. And this requires, in the first place, a construction of that clause of the first section of the act of Congress passed on that day, which declares the United States notes, the issue of which was authorized by the statute, to be a legal tender in payment of debts. The entire clause is in these words: “And such notes herein authorized shall be receivable in payment of all taxes, internal duties, excises, debts, and demands of every kind due to the United States, except duties on imports and demands against the United States of every kind whatsoever, except for interest upon the bonds and notes, which shall be paid in coin; and shall also be lawful money and a legal tender in payment of all debts, public or private, within the United States, except duties on imports and interest as aforesaid. (12 United States Statutes, 345.) This clause has already received much consideration here, and this court has held that upon a sound construction neither taxes imposed by a State Legislature (*Lane County v. Oregon*, 7 Wall., 71) nor demands upon contracts which stipulate in terms for the payment or delivery of coin or bullion, (*Bronson v. Rodes*, 7 Wall., 229; *Butler v. Hortwitz*, 7 Wall., 258,) are included by legislative intention under the description of debts, public and private. We are now to determine whether this description embraces debts contracted before as well as after the date of the act. Held, that it did, and that the act was so far unconstitutional. *Hepburn v. Griswold*, 8 Wall., 604. Overruled, and ruled that both as to antecedent and subsequent debts the law is constitutional. *The Legal Tender Cases*, 12 Wall., 529

On what
rests the
power to
issue treas-
ury notes?
And how
far are they
constitu-
tional?
Page 103,
notes 82-

Prece-
dents.

Bills of credit, 82, 154.
What are bills of credit and what amount of treasury notes and under what law?
Page 105, notes 85-88.

362. BILLS OF CREDIT. Congress may constitutionally authorize the emission of bills of credit. The treasury notes and national bank notes are bills of credit, both being issued on the credit of the United States. *Veazie Bank v. Fenno*, 8 Wall., 548, 604. Bills of credit further defined. *Moran v. Ditchemondy*, 41 Mo., 431; *Bailey v. Milner*, 35 Ga., 330; *City National Bank v. Mahan*, 21 La. Ann., 751. The act of 17 July, 1861, (12 Stat., 259,) authorized fifty million treasury notes, payable in coin on demand. This sum was increased to sixty million by the act of 12 February, 1862. (Ib., 338.) The act of 25 February, 1862, authorized \$150,000,000, not payable on demand, or at any time. This amount was increased to \$450,000,000, of which \$50,000,000 were held in reserve by the act of 11 July, 1862, and 3 March, 1863. (12 Stat., 532, 710.) *Veazie Bank v. Fenno*, 8 Wall., 537.

What does commerce include?

363. "TO REGULATE COMMERCE." This includes commerce carried on by corporations as well as individuals. Exchange brokers, money dealers, insurance companies, banks, &c., use the instrumentalities of commerce; but they are not commerce which the States cannot tax. (*Nathan v. Louisiana*, 8 How., 73.) *Paul v. Virginia*, 8 Wall., 182, 184.

What means among the several States?

364. "AMONG THE SEVERAL STATES." Acts allowing railroads to carry on continuous lines and to connect other lines, and to build bridges over rivers connecting States, are not intended to interfere with private contracts. *Railroad Company v. Richmond*, 19 Wall., 584.

This clause includes all the means by which intercourse for the purpose of trade may be carried on, whether by the free navigation of water or the passage over land through the States, when either becomes necessary for commercial intercourse between the States. (*Pennsylvania v. Wheeling Bridge Company*, 18 How., 421; *Corfield v. Coryell*, 4 Wash. C. C., 378; *Graves v. Slaughter*, 15 Pet., 504.) *Navigation Co. v. Dwyer*, 29 Tex., 382.

What of the passenger tax?
85.

365. THE POWER. The question of the nature of the power to regulate commerce, and how far that power is exclusively vested in Congress, has always been a difficult one, and has seldom been construed in this court with unanimity. (*Crandall v. Nevada*, 6 Wall., 35; *Hinson v. Lott*, 8 Wall., 152; *The Passenger Cases*, 7 How., 283; *Cooley v. The Portwardens*, 12 How., 299.) The right to tax passengers going out of a State or through a State denied. *Crandall v. Nevada*, 6 Wall., 44.

Justice Grier and Chief Justice Chase based their objections on this ground. The majority on the general ground that the citizens may be required to attend the Government, and have the right to do so. But whatever the reason, it was

held that a special tax on railroad and stage companies for every passenger carried out of the State is a tax on the passenger for the privilege of passing through the State by the ordinary modes of travel, and is not a simple tax on the business of the companies. *Crandall v. Nevada*, 6 Wall., 35. Such a law is unconstitutional. *Id.* So a law of Louisiana, which levied a tax of five dollars on every passenger, is a regulation of commerce, and unconstitutional and void. The object of this power was to place that commerce beyond interruption or embarrassment arising from conflicting or hostile State regulations. *Steamship Company v. Portwardens*, 6 Wall., 33.

366. QUARANTINE. The States may enact quarantine laws, although, in a greater or less degree, such laws affect commerce. If this affect it injuriously, Congress may control the legislation. (*Gibbons v. Ogden*, 9 Wheat., 203.) The means raised for quarantine must not violate the Constitution. The State cannot lay a duty on tonnage for such a purpose. (1 Stat. 619; *Tonnage Tax Cases*, 12 Wall., 204.) Hence sec. 4 of the act of Texas of 13 August, 1870, (Paschal's Dig., art. 7345,) which levied a tonnage tax for quarantine purposes in Galveston was unconstitutional. *Peete v. Morgan*, 19 Wall., 582-584.

What of the power to regulate quarantine?

If the tax has been illegally enacted, and the party has paid under protest, or with notice of intention to sue, if no other remedy has been prescribed, *assumpsit* against the collecting officer is the appropriate remedy. (*Elliott v. Swartwout*, 10 Pet., 150; *Bend v. Hoyt*, 13 Pet., 267.) Vessels licensed for waters navigable from the sea, of over ten tons burden, (1 Stat. 77,) are ships and vessels under the act for enrolling and licensing ships and vessels. (1 St., 305.) *State Tonnage Cases*, 12 Wall., 212.

367. COMMERCE, as used in the Constitution, comprehends navigation which extends to every species of commercial intercourse between the United States and foreign nations, and to all commerce in the several States, except such as is completely internal, and which does not extend to or affect the States. (*Gibbons v. Ogden*, 9 Wheat., 193.) And the power to regulate commerce includes navigation as well as traffic in its ordinary signification, and embraces ships and vessels as the instruments of intercourse and trade, as well as the officers and seamen employed in their navigation. *Brown v. Maryland*, 12 Wheat., 445; *New York v. Miln*, 11 Pet., 134; *People v. Brooks*, 4 Denio, 476; *Steamboat Company v. Livingston*, 3 Cowen, 743. The principle is illustrated in numerous other cases. *State Tonnage Cases*, 12 Wall., 216-219; *Steamship Company v. Wardens*, 6 Wall., 34; *Sheffield v. Parsons*, 3 Stewart & Porter, 304; *Lott v. Mor-*

Define navigation as commerce. 86, 89, 90.

Authori-
ties.

gan, 41 Ala., 250; *People v. Saratoga and Rensselaer Railroad Company*, 15 Wall., 131; *Steamboat Company v. Livingston*, 2 Cow., 743; *Alexander v. Railroad Company*, 3 Strobh., 598.

But taxes in aid of the inspection laws of a State, under special circumstances, have been upheld as necessary to support the interests of commerce. (*Cooley v. Portwardens*, 12 How., 314.) And where the act is to raise revenue without any corresponding benefit to the vessels taxed or the owners, it cannot be classed with the pilot dues and port charges. (*State v. Charleston*, 4 Rich. S. C., 286; *Benedict v. Vanderbilt*, 1 Rob. N. Y., 200.) Nor to a tax upon property in vessels. (*Towboat Company v. Bordelon*, 7 La. Ann., 195.) *State Tonnage Cases*, 12 Wall., 219, 220.

How far are
the Indian
tribes sub-
ject to the
laws of the
United
States?
91.

368. "AND WITH THE INDIAN TRIBES." In *Mackey v. Coxe*, 18 How., 103, it was held that the Cherokee country was a territory of the United States, within the meaning of the acts of Congress. Sec. 107 of the Internal Revenue act of 1868 extends the revenue laws only as to liquors and tobacco over the Indian country in question. (*The Cherokee Tobacco*, 11 Wall., 619.)

There is a long series of decisions of this court which hold the same doctrine. The Indian title in all this country is but a usufruct. As an Indian, he holds subject to the will of the Government, and can only alienate when the law allows it; and as communities, they can only alienate to the Government. (*Cherokee Nation v. Georgia*, 5 Pet., 1; *Worcester v. Georgia*, 6 Pet., 515; *United States v. Rogers*, 4 How., 567; *The Kansas Indians*, 5 Wall., 737; *Johnson v. McIntosh*, 8 Wheat., 574.) *The Cherokee Tobacco*, 11 Wall., 619.

In the *Cherokee Nation v. Georgia*, 5 Pet., 17, Chief Justice Marshall said: "The Indian Territory is admitted to compose a part of the United States. In all our geographical treatises, histories, and laws it is so considered." In *United States v. Rogers*, 4 How., 572, Chief Justice Taney said: "It is our duty to expound and execute the law as we find it; and we think it too firmly and clearly established to admit of dispute, that the Indian tribes residing within the territorial limits of the United States are subject to their authority; and where the country occupied by them is not within the limits of one of the States, Congress may, by law, punish any offense committed there, no matter whether the offender be a white man or an Indian. *The Cherokee Tobacco*, 11 Wall., 619. This last case really rules that "Indians not taxed" may be taxed, and that the tribes in the Indian country may be subjected to all the laws of the United States, and this without representation.

What are
the foreign

369. "TO ESTABLISH AN UNIFORM RULE OF NATURAL-
IZATION." The chancellor immediately arose, and replied

as follows: "The gentleman who has last spoken fears that a person who has lived five years in America, and been naturalized there, may yet, on his return here, be held to military duty. The literal observation of the treaty includes in itself that those whom we are bound to acknowledge as American citizens cannot be held to military duty in North Germany. That is the main purpose of the treaty. Whosoever emigrates *bona fide*, with the purpose of residing permanently in America, shall meet no obstacle on our part to his becoming an American citizen, and his *bona fides* will be assumed when he shall have passed five years in that country, and, renouncing his North German nationality, shall have become an American citizen. I believe, therefore, that no room has been left open for the anxiety that has been expressed, and I lay great stress upon here placing the subject in its true light."

treaties in
relation to
naturaliza-
tion and
expatria-
tion?
93.

Dr. Lowe questioned the chancellor on this point once more, saying: "To my joy, I think I may understand the Chancellor to say that no prosecution for unauthorized emigration can take place, even if the emigrant shall have ceased to be an American?" Count Bismarck replied, "I herewith confirm the declaration which the gentleman raises and desires; I might almost assert that we will treat the five years' absence in America, when connected with naturalization, as a fulfillment of the military duty in the North German Confederacy." Bancroft's dispatch on the treaty with North Germany, 3 April, 1868.

The naturalization laws have been so amended, by act of 14 July, 1870, (16 St., 254; Paschal's Digest, arts. 7163-7167,) as to guard against fraud and perjury in procuring and using naturalization papers. The whole naturalization law is now found in the Revised Statutes, secs. 2165-2174, and the punishment for frauds upon the law is in secs. 5395-5429. All naturalized citizens are entitled to protection in foreign countries, and to be released when imprisoned there. Secs. 2000, 2001.

By the reciprocity treaty of 20 Sept., 1870, between the United States and Austria, citizens of the United States who reside five years in the Austro-Hungarian empire, and are naturalized there, become citizens of that country; and reciprocally the same rule extends to citizens of the Austro-Hungarian monarchy who reside five years in the United States, and are naturalized here, become citizens of the United States; but each may resume their naturalization and become citizens without respect to time. Public Treaties, p. 34. A like treaty was concluded 19 July, 1868, with Baden. And with Bavaria, 26 March, 1868. Id., 44, 45. Explained. Id., 46. With Belgium, 16 Nov., 1868. Id., 61, 62. With Denmark, 20 July, 1872. With Great Britain, 13 May, 1870. Id., 349. With the Grand Duchy of Hesse, 1 Aug., 1868. Id., 424. With Mexico, 10 July, 1848. Id., 512. With the North German Union, 22 Feb., 1868. Id., 575. With Sweden and Norway,

What of
our recip-
rocity
treaties?

Reciprocity.

26 May, 1869. *Id.*, 744, 745. With Wurtemberg, 27 July, 1868. *Id.*, 811.

It results from these treaties that citizens of the United States may expatriate themselves by residing five years in any of the foregoing countries, and being naturalized in accordance with its laws; and such persons may regain their citizenship by returning to the United States and publicly renouncing their foreign allegiance. Naturalization does not interfere with extradition for crime.

What means "to coin?"

370. "TO COIN." To coin is simply to give the stamp of the supreme governmental power to any subject to give it all the attributes of money. *Shaw v. Trunslor*, 30 Tex., 395.

In *Bronson v. Rodes*, 7 Wall., 229, the suit was upon a contract dated in December, 1851, and payable in "gold and silver coin, current money of the United States." That of *Butler v. Horwitz*, 7 Wall., 258, was held to be of the same character, although the contract was dated in 1791, and was "for a yearly rent or sum of £15, current money of Maryland, payable in English golden guineas, weighing five pennyweights and six grains," &c. The case of *Lane County v. Oregon*, 7 Wall., 71, was held not to involve the question. In *Hepburn v. Griswold*, 8 Wall., 604, the note was dated 20 June, 1860, and matured 20 June, 1862, and was payable in "dollars." So that, in point of fact, in all these cases the contracts were made before the passage of the first legal-tender act. (12 U. S. St. at Large, 345, 532, 709; 2 Brightly's Dig., 167, 168.)

Are treasury notes legal tenders?

And, finally, it was held that the treasury notes were legal tenders (where it is not otherwise expressed) in payment of contracts, both anterior and subsequent to the passage of the act. *Legal Tender Cases*, 12 Wall., 552; and see *Paschal's Digest of Decisions*, §§ 16963-16987.

What of the coinage acts?

The several coinage acts of Congress make the gold and silver coins of the United States a legal tender in all payments, according to their nominal or declared values. Acts of 18 Jan. 1837; 3 March, 1849; 25 Feb. 1862. This latter act declares that the notes of the United States shall be lawful money, and a legal tender in payment of debts; and this act has been sustained in the *Legal Tender Cases*, 12 Wall., 529, as valid and constitutional. So that we have two kinds of money, essentially different in their nature, but equally lawful. And the distinction between the two kinds of money is recognized by several acts of Congress. (12 U. S. St. at Large, 370; *Id.*, 719, § 4; 14 *Id.*, 147; 1 *Id.*, 250, § 20; *Cheang Kee v. The United States*, 3 Wall., 320.) *Treblecock v. Wilson*, 12 Wall., 696-698.

What coins are legal tenders?

A number of foreign coins have been declared legal tenders by sundry acts of Congress. 1 U. S. St. at Large, 301, § 2; 1 Brightly's Dig., 153, § 20; 2 U. S. St. at Large, 374; 1 Brightly's Dig., 154, § 26; act 25 June, 1834, 4 U. S. St. at

Large, 681, § 1; 1 Brightly's Dig., 155, § 29; act 25 June, 1834, 4 U. S. St. at Large, 700, § 1; 1 Brightly's Dig., 155, § 31; act 3 March, 1843, 531, 700, § 1; 1 Brightly's Dig., 155, § 34. These acts respectively used the terms "legal tender," "current coin," "legal value, and pass current in the United States by tail for the payment of all debts and demands," &c. Finally, after we had got native gold enough for our purposes, all the laws making foreign coins legal tenders were repealed by section 3 of the act of 21 Feb., 1857. 11 U. S. St. at Large, 163, § 3; 1 Brightly's Dig., 156, § 41. See an accurate history of these several acts in the *Metropolitan Bank v. Van Dyck*, 27 N. Y., 424, 426, and in the brief and opinions in the legal tender cases.

371. "MONEY." The materials are gold, silver, and paper. Wharton's Law Lexicon, *Money*, 602. Bank of England notes were first made a legal tender by the 6th section of the act of 3 and 4 William IV, ch. 9. Id. Define money? 83.

For a very critical definition, see Coke on Littleton, lib. 3, ch. 5, secs. 336, 207a.

English money was coined by the king's authority, and foreign money legalized by proclamation. Called coin, because the French coin had corners. Some say that *coine dicitur a ferinos, id est communis quod sit omnibus rebus communis. Moneta dicitur a monendo*, to use it cautiously, &c. *Pecunia dicitur à pecu* (beasts) *omnes enim veterum divitia in animalibus consistant*. In Homer's time there was no exchange but cattle. Coke Littleton, 207a.

Coin differs from money, as the species from the genus.

Money is any matter, whether metal, paper, beads, shells, &c., which have currency as a medium in commerce. Coin is a particular species, always made of metal, and struck according to a certain process called coining. Wharton's Law Lexicon, COIN, 180.

The coinage of money is regulated by the acts about the United States mints. Revised Statutes, 3528-3600 and 5460. For coinage and weights and measures see Rev. Stat. secs. 3495-3570.

372. "POST OFFICES AND POST ROADS." The history of post offices and post roads is given more fully in Broome and Hadley's Commentaries, chap. 8, p. 383, (Wait's edition, p. 247,) under the title "The King's Royal Revenues," than in Blackstone's Commentaries. The first master of the posts is traced to 1516, when Sir Brian Tuke was appointed; but the practice of sending letters by post on royal business was much earlier. From Mr. Wait's notes we copy the following synopsis of decisions: "The Postmaster General is but a mere agent of the United States as to all official acts and contracts. *Locke v. Postmaster General*, 3 Mason's C. C., 446. He has the authority to establish post offices, whether Give the history of post offices and post roads.

Mails.

the commissions are more or less than \$1,000. *Ware v. United States*, 4 Wall., 617. He may require and take bonds from postmasters. *Postmaster General v. Early*, 12 Wheat., 136; *Postmaster General v. Rice*, Gilp., 554; *Attorney General v. Reeder*, 4 Wash. C. C., 468. If a postmaster unlawfully detains mail matter from the individual to whom it is addressed, it is a conversion, for which an action of trover may be maintained against him. *Teal v. Felton*, 12 How., (U. S.), 284, affirming S. C., 1 N. Y., (1 Comst.), 237; 3 Barb., 512. And the action will lie in the State courts. *Ib.* It is the duty of the postmaster to deliver letters deposited at the same office. *Nevins v. Bank of Lansingburg*, 10 Mich., 547; *Bank of Columbia v. Lawrence*, 1 Pet., 578.

What action will lie against postmasters?

A civil action will lie in a State court against a postmaster for negligence, whereby a letter containing money was stolen from his office. *Coleman v. Frazier*, 4 Rich., (S. C.), 146; *Bolan v. Williamson*, 1 Brev., 181; S. C., 2 Bay, 551. And the postmaster is liable for the negligent acts of his assistant in the discharge of the duties of the office. *Ib.*; see *Teal v. Felton*, *supra*. But see *Schroyer v. Lynch*, 8 Watts., 453, as to the purloining of a letter by a deputy." It will also lie against a carrier who carelessly lost a mail pouch with money. *Sawyer v. Corse*, 11 Gratton, 1.

A postmaster is liable for the acts of one whom he permits to have the care and custody of the mail in his office, not having been sworn according to law. *Bishop v. Williamson*, 11 Me., (2 Fairf.), 495. And a deputy postmaster is liable in an action by the party sustaining a loss by his negligence. *Maxwell v. McIlvay*, 2 Bibb., 211.

Where may the United States sue a postmaster?

The United States may sue a postmaster before a justice of the peace, if the amount claimed be within his jurisdiction. *McNormell v. United States*, 6 Eng., (Ark.), 148. But no action lies against a postmaster upon an unaccepted draft upon him from the Post Office Department in favor of the holder. *Goodwin v. Hazzard*, 1 Carter, (Ind.), 514.

Nor will an action lie against him for refusing to give a newspaper the publishing of advertisement as to letters remaining in post offices, as required by act of Congress, because a private action will not lie to enforce a public duty, unless it is given by statute. *Fosters v. McKibben*, 14 Penn. St., 168; *Strong v. Campbell*, 11 Barb., 135.

Where are the general laws?

The general laws in relation to post offices and post roads are reproduced in the Revised Statutes, sections 388-414, 3634-3644, 3774, 3797, 3804, 3829-4057, 5266, 5267. And the laws regulating postmasters are in sections 52, 53, 72, 294, 889, 890, 952, 3639, 3830-4961. So vast an amount of "necessary and proper" legislation shows how much has been implied from the three words "to establish post offices and post roads." A revision of the laws defining all the post offices and post roads was made in 1873, and is bound up with the foreign treaties and the laws respecting the District of Columbia.

On 22d June, 1874, Congress passed an act, which covers 343 large pages, revising and defining all the post offices and post roads in the United States. Revised Statutes, relating to Post Offices and Post Roads.

The statute of 22d September, 1789, provided for the appointment of a Postmaster General. (1 St., 70.) The acts showed that it was merely the continuation of the post office system under the Continental Congress. On the 4th August, 1790, a supplementary act was passed to continue this act in force until the end of the next session of Congress. (1 St., 178.) And on the 3d March, 1791, it was again continued in force until the end of the next session of Congress. (1 St., 218.) In act of details of 22d February, 1792, the Continental laws were again continued in force until the first of June of that year. (1 St., 239.) In general terms these laws were continued until the first of June, 1794. The provisional post-office arrangement of the confederation remained in force until 1 June, 1794, when the act of 8 May previous went into operation, 1 June being Sunday. Timothy Pickering was appointed and confirmed and served one day. This is the only instance of such an appointment during the sessions of the Senate. 1 Trial of the President, 368.

What are the acts about post offices and post roads?

373. "TO PROMOTE THE PROGRESS OF SCIENCE AND THE USEFUL ARTS, BY SECURING FOR LIMITED TIMES TO AUTHORS AND INVENTORS THE EXCLUSIVE RIGHT TO THEIR RESPECTIVE WRITINGS AND DISCOVERIES." The right is exclusive. Hence the forced sale of stereotyped plates does not carry the author's exclusive right to print and sell the book. *Stevens v. Cady*, 14 How., 528; *Stevens v. Gladding*, 17 How., 448.

What are the exemptions of authors from forced sales?

And the right to sell the books while they are the property of the author is denied. *Cooper v. Gunn*, 4 B. Monr., 596.

But Justice Nelson believed that by an equity proceeding (a creditor's bill) the author might be compelled to assign his copyright. *Stevens v. Gladding*, 14 How., 528.

The voluntary sale of a patented machine does carry along the inventor's right to use that machine, whether the sale be voluntary or involuntary. (*Hesse v. Stevenson*, 3 Boss. & Pull., 565; *Blosam v. Elsee*, 5 Barn. & Cress., 169; *Hindm. on Patents*, 240, 327; *Swain v. Guild*, 2 Galb., 485.) *Woodworth v. Curtis*, 2 Wood. & Min., 530.

The present patent laws, with references to the citations, will be found in the Revised Statutes. They are also printed and circulated in pamphlets by the department.

374. "TO CONSTITUTE TRIBUNALS INFERIOR TO THE SUPREME COURT." The tribunals which have been constituted under this head are the District and Circuit Courts, over which preside district and circuit judges, with whom are frequently associated the Associate Justices of the Supreme Court of the United States. The respective jurisdictions of these courts are defined in sections 530-672 of the Revised

What inferior tribunals have been established? 191, 195.

Tribunals.
109.
191.

Statutes. For some purposes the courts of the Territories and District of Columbia and the Court of Claims may be considered inferior courts. But it has been denied that their judges hold during good behavior. And their whole organizations are subject to repeal. But is not this so as to the Supreme and Circuit Courts?

What effect
have the
State rule-
ings?

375. STATE RULINGS. The ruling of the Supreme Court of a State upon its own constitution is conclusive upon the Supreme Court of the United States. *Randall v. Brigham*, 7 Wall., 541; *Provident Institution v. Massachusetts*, 6 Wall., 630; *Gut v. The State*, 9 Wall., 37.

But if the State decisions violate contracts, or take away all remedy for the enforcement of a judgment or contract, so that none is left, or affect the process of the federal courts, the State decisions will not be followed. *Butz v. City of Muscatine*, 8 Wall., 575.

The cases of *Warren v. Leffingwell*, 2 Black, 599; *Gelficke v. Dubuque*, 1 Wall., 175; *Lee County v. Rogers*, 7 Wall., 181, are declared, in the dissentient opinion of Mr. Justice Miller, to be impaired by this last decision. *Butz v. City of Muscatine*, 8 Wall., 585.

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Notes 117-
121.

376. "TO DECLARE WAR." That the late rebellion, when it assumed the character of civil war, was attended by the general incidents of a regular war, has been so frequently declared here, that nothing further need be said on that point. *The Grapeshot*, 9 Wall., 132. And that intercourse between the belligerents was forbidden. See *McKee v. United States*, 8 Wall., 166; *Ouachita Cotton Case*, 6 Wall., 521. It followed as a result of the war. *United States v. Lane*, 8 Wall., 195.

118.

377. INCIDENT OF THE POWER. In *Leitsendorfer v. Webb*, 20 How., 176, the authority of the officer holding possession in Mexico for the United States to establish a provisional government was sustained, and the reasons upon which that judgment was supported apply directly to the establishment of a provisional government in Louisiana. The cases of *Jecker v. Montgomery*, 13 How., 498, and 18 How., 110; *Texas v. White*, 7 Wall., 700, may be cited in illustration of the principle applicable to military occupation. *The Grapeshot*, 9 Wall., 133. [See the cases collected, *Paschal's Digest of Decisions*, §§ 20743-20752.]

The civil war between the United States and Confederate States began, at least, for some purposes, and in some localities, as early as 13th April, 1861. (*The Prize Cases*, 2 Black, 636.) The court held that war commenced with the President's proclamation of blockade of 27th April, 1861. (12 Stat., 257; and see proclamation 15th, 19th, 27th April, 1861, 12 Stat., secs. 1258-1260.) But the treaty of Washington with Great Britain fixes the date at 13th April, 1861. (17 Stat., 1867, sec. 12; *Diplomatic Correspondence of April and*

July, 1865, secs. 362-423.) And, by proclamation of 13th July, 1861, eleven States, with unimportant exceptions, were declared to be in rebellion. (12 Stat., 1260-1266; *The Venice*, 2 Wall., 277.) The war was continued in those States until the President's proclamations of 1866. (McPherson's History of Reconstruction, 194; 13 Stat., 763; *The Protector*, 12 Wall., 702; *United States v. Anderson*, 9 Wall., 56; *Grossmeyer v. United States*, 9 Wall., 72.) Lawrence's Report, 43d Congress, No. 262.) But while the war in Texas did not, for some purposes, close until 20 August, 1866, the people of that State, and of Illinois and California, were not public enemies. The existence of war closes the courts of each belligerent to the citizens of the other, but it does not prevent the citizens of one belligerent from taking proceedings for the protection of their own property in their own courts against the citizens of the other, whenever the latter can be reached by process. In *The Protector*, 12 Wall., 709, it was held that the war began at the date of the President's proclamation of blockade, and that the time between that date and the date of the President's proclamations of peace, or of its close, must be deducted from the statutes of limitation. This is the extent of the decisions of this court. *Brown v. Hiatts*, 15 Wall., 184; *Adger v. Alston*, Id., 560. *Masterson v. Howard*, 18 Wall., 105, 106.

War power.

How is this explained?

Property situated in St. Louis, belonging to a citizen of Virginia, was lawfully sold by a trustee to pay the debt of a loyal citizen of Missouri. The cases of *Hanger v. Abbott*, 6 Wall., 532, and *Dean v. Nelson*, 10 Wall., 158, are not against this principle.

An alien enemy may be sued, though he cannot sue in our courts. When sued he may appear in defense. *McVeigh v. The United States*, 11 Wall., 259. A state of war may be continued beyond the general suspension of hostilities in its theatre—"non flagrante bello sed non dum cessante bello." (Mrs. Alexander's Cotton Case, 2 Wall., 419; *Cross v. Harrison*, 16 How., 164; Whiting's War Powers, 58; Lieber, 442, sec. 1142; *Elkinston v. Bedruchund*, 1 Knapp, 300.) Lawrence Report, 3. War, either foreign or civil, may exist where no battle has been or is being fought. (*Ex-parte Milligan*, 4 Wall., 127-142; *Luther v. Borden*, 7 How., 1; *Howard v. The United States*, 1st Court of Claims R., 41; S. C., 2 Id., 551.) Lawrence Report, 4. When war exists, either belligerent may modify or limit its operation as to persons or territory of the other, but in the absence of such modification or restriction, judicial tribunals cannot discriminate in its application. *The Venice*, 2 Wall., 274.

Can an alien enemy be sued?

In *Ex-parte Milligan*, 4 Wallace, 137, Chief Justice Chase said: "The Constitution itself provides for military government as well as civil government. And we do not understand it to be claimed that the civil safeguards of the Constitution

Military
govern-
ment.

have application *in cases within the proper sphere of the former.*" Page 137. (See 2 Opinions, 297.)

Whiting's War Powers, 27, 51.

How does
the law of
nations af-
fect war?

378. BY THE LAWS OF NATIONS. From this and other authorities Mr. Lawrence seemed to deduce that, as the laws of nations are obliged to be recognized, and these carry along the laws of war, the citizens in the States in rebellion have no right to claim the protection of the Vth amendment of the Constitution. His language is: "But where war is actually flagrant, or a state of war and the exercise of military authority exist, the laws of war prevail; and, so far as clearly necessary for all purposes of war, they are so far exclusive that no antagonistic law or exercise of jurisdiction can be allowed."

In *Ex-parte Milligan*, 4 Wallace, 127, the test applied as to whether the laws of war were in force *quoad rights of person*, was whether the civil courts were open, and it was held that the court was the judge of this. [And see Coke Com. Lit., lib. 3, ch. 6, sec. 412, p. [249 b.]]

Lawrence's Wheaton, 526, (2 Am. ed.) Lawrence says this is the English rule, and applies to the seizure of real estate, "so as the courts were shut up, *et silent inter leges arma.*"

Grant v. U. S., 1 N. & H. Court Claims, 41:

But the *mere fact*, that under the protection of military power, civil courts aided the administration of justice, could not exclude rightful military authority. The civil courts were open more or less in the District of Columbia and some of the States during a portion of the period of the rebellion.

The edit-
or's dis-
sent?

This was largely the doctrine and practice of the Confederate officers in regard to the rights of their own citizens. But the editor could never give it countenance. He could never comprehend why those not connected with the army or navy or militia when in actual service, were not entitled to all the protection guaranteed by the bills of rights and the constitutional guaranties to which they are entitled in time of peace. The military laws are for the government of the military establishment only.

How as to
property in
the insur-
gent States?

In *United States v. Klein*, 13 Wall., p. 128, the court said: "It may be said, in general terms, that property in the insurgent States may be distributed into four classes: [1.] That which belonged to the hostile organizations, or was employed in actual hostilities on land; [2.] That which at sea became lawful subject of capture and prize; [3.] That which became the subject of confiscation; [4.] A peculiar description, known only in the recent war, called captured and abandoned property.

"1. The first of these descriptions of property, like property of other like kind in ordinary international wars, became, wherever taken, *ipso facto* the property of the United States. Halleck's Int. Law.

"2. The second of these descriptions comprehends ships and vessels, with their cargoes, belonging to the insurgents, or employed in aid of them; but property in these was not changed by capture alone, but by regular judicial proceeding and sentence. Military power.

"Accordingly it was provided, in the abandoned and captured property act of March 12, 1863, (12 St., p. 820,) that the property to be collected under it 'shall not include any kind or description used, or intended to be used, for carrying on war against the United States, such as arms, ordnance, ships, steamboats and their furniture, forage, military supplies, or munitions of war.' "

The rules in respect to captured and abandoned property, and the trust in favor of the owners, are fully given in *Klein v. The United States*; in *Paddleford's case*, 9 Wall., 531; in *Carlisle v. The United States*, 16 Wall., 147; in *Planters' Bank v. Union Bank*, 16 Wall., 495.

379. "TO RAISE AND SUPPORT ARMIES" and "PROVIDE FOR THE GOVERNMENT OF THE LAND AND NAVAL FORCES." The control of the United States government over these subjects is plenary and exclusive. It can determine, without question from any State authority, how the armies shall be raised, whether by voluntary enlistment or forced draft; the ages of soldiers; the period of service, what it shall be, and the compensation. It can provide the rules of government, define offenses and punishments. With none of these powers can the States interfere. They cannot by *habeas corpus* release those thus connected with the army. Such a remedy, where the imprisonment is under authority or color of authority by the United States, belongs to their courts. (In the matter of *Severy*, 4 Clifford, 000; In the matter of *Keeler*, *Hempstead*, 306; *Ableman v. Booth*, 21 How., 506.) *Tarble's case*, 13 Wall., 408-411. What of the power over armies?
122-126.

380. "BUT NO APPROPRIATION TO THAT USE SHALL BE FOR A LONGER PERIOD THAN TWO YEARS." So that it is in the power of the succeeding House of Representatives to withhold the appropriation for the Army support, and thus disband it, if the President has used or designs to use it for improper purposes. *Ex parte Merriman*, Taney, C. C. Dec., 258, 259. How are appropriations limited?

381. "TO MAKE RULES FOR THE GOVERNMENT AND REGULATION OF THE LAND AND NAVAL FORCES." It results that Congress may impose such restrictions and limitations upon the appointing power as it deems proper, in regard to promotions or appointments to fill any and all vacancies, of whatever kind, occurring in the army; but such regulations must not restrict the appointing power. The many statutes restricting promotions were cited and sustained. 14 Op., 172. State the rule as to army regulations.

By whom
officered?

382. "RESERVING TO THE STATES RESPECTIVELY THE APPOINTMENT OF THE OFFICERS." This is a security against the military power for purposes dangerous to the liberties of the people or the rights of the States. *Ex parte Merriman*, Taney, C. C. Dec., 258, 259.

Define cap-
tures. *

383. "CAPTURES ON LAND AND WATER." A capture is a taking by the enemy of a vessel or cargo as prize in time of open war, or, by way of reprisal, with the intent to deprive the owner of it. And it may now embrace the taking of a neutral ship and cargo by a belligerent *jure belli*; also, the taking forcibly by a friendly power, in time of peace, and even by the government itself to which the assured belongs. Phillips on Insur., §§ 1108, 1109; Arnould on same, 808, 814; 2 Marshall on same, 495, 496, 507; Powell v. Hyde, 5 Ellis & Blackb., 607; Maura v. Insurance Company, 6 Wall., 10; Dale v. New Eng. Ins. Co., 6 Allen, 386, 387.

Capture is lawful when by a declared enemy lawfully commissioned and according to the laws of war, and unlawful when made otherwise; but whether lawful or unlawful, the underwriter is liable. Powell v. Hyde, 5 Ellis & Blackb., 607; Kleinworth v. Shepherd, 1 Ellis & Ellis, 447; Berens v. Rucker, 1 Blackst. R., 313; Dale v. New Eng. Ins. Co., 6 Allen, 389. Every species of capture, whether by friends or enemies. 3 Kent's Comm., 304, 305; Id., Benecke, 348; Dale v. New Eng. Ins. Co., 6 Allen, 388; Abbott on Shipp., 27; 1 Kent's Comm., 108. And it need not be by a lawful government. United States v. Palmer, 3 Wheat., 610. Capture is used in the same sense as *prize*. Emerigon, c. 12, § 18; Dale v. New Eng. Ins. Co., 6 Allen, 388.

Define a *de*
facto gov-
ernment.

384. DE FACTO GOVERNMENT DEFINED. A *de facto* government is one in possession of the supreme sovereign power, but without right—a government by usurpation, founded, perhaps, in crime, and in the violation of every principle of international or municipal law and of right and justice; yet while it is thus organized, and in the exercise and control of the sovereign authority, there can be no question between the insurer and insured as to the lawfulness of the government under whose commission the capture has been made. Maura v. Insurance Company, 6 Wall., 13.

A *de facto* government is "the ruling power of the country;" "the supreme power;" "the power of the country, whatever it might be." Not necessarily a lawful power or government, or one that had been adopted in the family of nations. Nesbitt v. Lushington, 4 Term., 763.

The government of the Confederate States was unconstitutional and void, yet, for the purposes of capture, it was a *de facto* government. Dale v. New Eng. Ins. Co., 6 Allen, 373; Fifield v. Insurance Co., 47 Penn. State, 166; Dale v. Merchants' Marine Ins. Co., 51 Maine, 464; Maura v. In-

insurance Company, 6 Wall., 14. These cases exhaust the whole subject of capture. But the confiscations and sequestrations by the courts of the Confederate States were void, and within the principle of *Texas v. White*, 7 Wall., 700. *Legal Tender Cases*, 12 Wall., 554.

De facto
government.

If the seizure be made on navigable waters, within the ninth section of the judiciary act, the case belongs to the instance side of the district court; but where the seizure was made on land, the suit, though in favor of a libel or information, is an action at common law, and the claimants are entitled to a trial by jury. *Confiscation Cases*, 7 Wall., 462; *Armstrong's Foundry*, 6 Wall., 769; *Morris's Cotton*, 8 Wall., 511. And as to what are navigable waters for this purpose, see *Insurance Company v. United States*, 6 Wall., 765; *United States v. Hart*, Id., 772; *Morris's Cotton*, 8 Wall., 511.

There are several degrees of *de facto* governments, as when it assumes the characteristics of a lawful government; when its adherents against the government *de jure* do not incur the penalties of treason; and when, under certain limitations, obligations assumed by it in behalf of the country or otherwise will in general be respected by the government *de jure* when restored. (St. 11 Henry VII, c. 1, 2 British Stats. at Large, 82; 4 Bl. Comm., 77.) But see *Sir Henry Vane's case*, 6 State Trials, 109. The Confederate States was not a government of this character, but one of force. *Thorington v. Smith*, 8 Wall., 9.

Different
kinds.

There may be *de facto* governments whose existences are maintained by active military power within the territories, and against the rightful authority of established governments, and while they exist they must be obeyed in civil matters by the citizens. *United States v. Rice*, 4 Wheat., 253; *Fleming v. Page*, 9 How., 614; *Thorington v. Smith*, 8 How., 9, 10.

The central government established for the Confederate States differed from the temporary government at Castine and Tampico in the circumstance that its authority did not originate in lawful acts of regular war, but it was not, on that account, less actual or supreme. *Thorington v. Smith*, 8 How., 10. See Paschall's Digest of Decisions, §§ 8961-8986.

The Con-
federate
States.

From these principles it was deduced that contracts between citizens of the Confederate States, payable in Confederate States treasury notes, although these notes were themselves void, have some legal force. Id., 11.

The acts of a government in actual possession in the ordinary administration of its laws, so far as they affect private rights, are valid, and can be set up to support an action or defeat a right; such as the payment of duties on goods in Castine while held by the British in 1814. (*United States v. Rice*, 4 Wheat., 246.) So of adjudications about lands in Louisiana in 1803 and 1804, after the cession to the United States, but while the Spanish authorities were *de facto* in

Cases. possession. (Keene v. McDonough, 8 Pet., 310; Davis v. The Police Jury of Concordia, 9 How., 286; Fama v. Robin's Adms., 107; 2 Pena y Reyna, 81; 2 Practica Formsa, 88.) Trevinio v. Fernandez, 13 Texas, 663-666.

What of the
District of
Columbia?
136, 137.

385. "TO EXERCISE EXCLUSIVE LEGISLATION IN ALL CASES WHATSOEVER OVER SUCH DISTRICT," &c. On 22 June, 1874, Congress passed an act revising the laws of the District of Columbia. On 21 Feb., 1871, the Corporations of Washington and Georgetown were abolished, and a District Government, with a Governor and Legislative Council, was created; but that government, with its Board of Public Works, was abolished by the act of 20 June, 1874, for the government of the District of Columbia. This act placed the District under the supervision of Commissioners, and destroys the whole elective system. 17 Stat., 116. The act creating a governor and legislative body was, in fact, but a continuation of a municipality, in which the District of Columbia became a corporation, with the governor corresponding to the mayor, and the legislature to the aldermen. The board of public works is not a corporation, but the mere officers of the District, for whose acts the District government is responsible. This case (1 McArthur, 322) is reversed. Barnes v. The District of Columbia, October Term, 1875, 1 Otto, 000.

What is the
jurisdic-
tion as to
forts, arse-
nals, &c.?
137.

386. "AND TO EXERCISE LIKE AUTHORITY OVER ALL PLACES PURCHASED BY THE CONSENT OF THE LEGISLATURE OF THE STATE IN WHICH THE SAME MAY BE, FOR THE ERECTION OF FORTS, MAGAZINES, ARSENALS, DOCKYARDS, AND OTHER NEEDFUL BUILDINGS." When the United States own land in a State, which has not ceded jurisdiction for objects either general or special, the rights and remedies in relation to it are those which usually apply to other land owners within the State, upon the principle that the *lex loci rei sitae* governs as to remedies. (United States v. Crosby, 7 Cr., 115; Kerr v. Moore, 9 Wheat., 565; McCormick v. Sullivan, 10 Wheat., 192; Robinson v. Campbell, 3 Wheat., 212, 219.) So the Government, as a mere proprietor, must in most respects be treated as other proprietors as to all servitudes, easements, and other charges. (Story's Conflict of Laws, § 447.) United States v. Ames, 1 Woodbury & Minot, 80.

The laws of the United States, and not those of the State, punish offenses within the ceded jurisdiction. *Id.*, 81, 82.

The laws of the State in reference to the ceded property may be controlled by the acts of Congress and the Constitution, if such laws tend to destroy or injure. (Attorney General Butler, 1150-1152.) And the ordinary laws of the State do not prevail within the territory ceded to the Government. (Commonwealth v. Clary, 8 Mass., 72; United States v. Bevins, 3 Wheat., 336, 338; Cohens v. Virginia, 6 Wheat., 264, 364.) The States wherein such establishments exist, if juris-

diction over them has been ceded, do not regard them or their occupants as subject to any of the State laws. Forts, arsenals, &c.

They cannot vote nor be taxed. (*U. S. v. Cornell*, 2 Mason, 60.) All rights may be enforced through the courts of the United States, and all wrongs punished thereby. (*Cohens v. Virginia*, 6 Wheat., 264, 428.) Congress alone can prescribe punishments for crimes within such cessions. The States cannot tax the property of individuals nor of the United States there. (Attorney General Wirt's Opinion, Sep. 8th, 1823, pages 101, 469; *Dobbins v. Commissioners of Erie county*, 16 Wheat., 435.) Nor can the States pass statutes of limitation affecting the property of the United States held for special purposes. (*Jordan v. Barrett*, 4 How., 169.) *United States v. Ames*, 1 Woodberry & Minot, 84, 85.

But a distinction is made between those who reside upon the reservation and those who are employed there and reside elsewhere. *Commonwealth v. Cleary*, 8 Mass., 74.

387. "TO MAKE ALL LAWS WHICH SHALL BE NECESSARY AND PROPER FOR CARRYING INTO EXECUTION THE FOREGOING POWERS." This section is to be read in connection with the tenth amendment. It was undoubtedly introduced to exclude all doubt in respect to the existence of implied powers, while the words "necessary and proper" were intended to have a "sense," (to use the words of Mr. Justice Story,) "at once admonitory and directory, and to require that the means used in the execution of an express power should be *bona fide* appropriate to the end." (1 Story on Constitution, p. 142, § 1253.) *Hepburn v. Griswold*, 8 Wall., 614. Before we can hold the legal tender acts unconstitutional we must be convinced that they were not appropriate means, or conducive, in any degree, to the execution of any or all of the powers of Congress or of the Government; or else we must hold that they were prohibited. Power over a particular subject may be exercised as auxiliary to an express power, though there is another express power relating to the same subject less comprehensive. (*United States v. Marigold*, 9 How., 560.) Congress must possess the choice of means, and must be empowered to use any means which are in fact conducive to the exercise of a power granted by the Constitution. The Government is to pay the debts of the Union, and must be authorized to use the means which appear to itself most eligible to effect that object. (*Fisher v. Blight*, 2 Cranch, 358.) In *McCulloch v. Maryland*, 4 Wheat., 405, it was finally settled that in the gift by the Constitution to Congress of authority to enact laws "necessary and proper" for the execution of all the powers created by it, the necessity spoken of is not to be understood as an absolute one. On the contrary, this court then held that the sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it

What is the general power to make laws? Page 269, note 269.

138.

78.

Construc-
tive pow-
ers.
Ends and
means.

confers are to be carried into execution, which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional. (*McCulloch v. Maryland*, 4 Wheat., 421.) *Legal Tender Cases*, 12 Wall., 539; *Hepburn v. Griswold*, 8 Wall., 614; *Paschal's Dig. of Dec.*, §§7465-7484.

What is the
rule as to
necessary
and proper?
Page 325,
clause 2.

388. "NECESSARY AND PROPER." Every doubt is to be resolved in favor of the constitutionality of a law. The judicial power is to be exercised with delicacy and caution. (*Twitchell v. Blodgett*, 13 Mich., 127; *Tyler v. The People*, 8 Id., 320; *People v. Mahoney*, 13 Id., 482.) And while, ordinarily, this court will follow the State courts in the constructions of their constitutions, yet when town or county bonds have issued and been circulated, and the question has become commercial, this court will construe those State constitutions for itself. (*Gilman v. Sheboygan*, 2 Black, 513; *United States v. Babbit*, 1 Black, 61; *Swan v. Williams*, 2 Mich., 427; *Meyer v. Muscatine*, 1 Wall., 389; *The People v. Salem*, 20 Mich., 452; *Bay City v. The State Treasurer*, 23 Id., 499; *Gelpecke v. Dubuque*, 1 Wall., 175; *Butz v. Muscatine*, 8 Wall., 579; *Railroad Company v. County of Otoe*, 16 Wall., 567; *Sedgwick on Statutory and Constitutional Laws*, p. 90; *Olcott v. The Supervisors*, 16 Wall., 678.) *Township of Pine Grove v. Talcott*, 19 Wall., 676-678.

What of
migration
and impor-
tation?

SECTION 9. ¹The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and Eight, but a Tax or Duty may be imposed on such Importation, not exceeding ten Dollars for each Person.

What of the
*habeas cor-
pus*?
140, 141.

²The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

What is the
power of
the United
States
Court over
the sub-
ject?

389. "THE PRIVILEGE OF THE WRIT OF HABEAS CORPUS SHALL NOT BE SUSPENDED." As limited by the act of 1789 the writ did not extend to cases of imprisonment after conviction under sentences of competent tribunals; nor to any prisoners in jail unless in custody under or by color of the authority of the United States; or committed

for trial before some court of the United States; or required to be brought into court to testify. But this limitation has been gradually narrowed, and the benefits of the writ have been extended, first, in 1833, (4 Stat., 634,) to prisoners confined under any authority, whether State or national, for any act done or omitted in pursuance of a law of the United States, or of any order, process, or decree of any judge or court of the United States; then, in 1842, (5 Stat., 539,) to prisoners being subjects or citizens of foreign States in custody under national or State authority for acts done or omitted by or under color of foreign authority, and alleged to be valid under the law of nations; and, finally, in 1867, (14 Stat., 385,) to all cases where any person may be restrained of liberty in violation of the Constitution or of any treaty or law of the United States. *Ex parte Yerger*, 8 Wall., 102. This case reviews Wells's Case, 18 How., 368; Kaine's Case, 14 How., 103. Contempt. Statutes.

In all cases where a circuit court of the United States has, in the exercise of its original jurisdiction, caused a prisoner to be brought before it, and has, after inquiring into the cause of detention, remanded him to the custody from which he was taken, this court, in the exercise of its appellate jurisdiction, may, by the writ of *habeas corpus*, aided by the writ of *certiorari*, revise the decision of the circuit court, and if it be found unwarranted by law, relieve the prisoner from the unlawful restraint to which he has been remanded. *Ex parte Yerger*, 8 Wall., 103.

The act 27th March, 1868, reads as follows:

"That so much of the act approved February 5, 1867, as authorizes an appeal from the judgment of the circuit court to the Supreme Court of the United States, or the exercise of any such jurisdiction by said Supreme Court on appeals which have been or may be hereafter taken, be, and the same is hereby, repealed." (15 Stat., 44; 4 Stat., 85.) Appeal.

This law only repealed the act of 1867; but not the acts of 1789, 1833, and 1842, which provided for revision through means of *certiorari*. *Ex parte Yerger*, 8 Wall., 105; McCordle's Case, 7 Wall., 508.

The authority of the Supreme Court to issue a writ of *habeas corpus*, under the Constitution and the judiciary act of 1789, to examine the proceedings in the inferior court to ascertain whether the court has exceeded its authority, is no longer an open question. (Hamilton's Case, 3 Dall., 17; Burford's Case, 3 Cr., 448; *Ex parte Bollman*, 4 Cr., 75; *Ex parte Watkins*, 3 Pet., 193; S. C., 7 Pet., 568; *Ex parte Metzger*, 5 How., 176; *Ex parte Kaine*, 14 How., 103; *Ex parte Wells*, 18 How., 307; *Ex parte Milligan*, 4 Wall., 2; *Ex parte McCordle*, 6 Wall., 318; S. C., 7 Wall., 506; *Ex parte Yerger*, 8 Wall., 85.) *Ex parte Lange*, 18 Wall., 166. Is the power an open question?

The court has power over its own judgments during the term. (*Bassett v. The United States*, 9 Wall., 38.) *Ex parte Lange*, 18 Wall., 166, 167.

Define the writ?

390. DEFINED. A *habeas corpus* is in the nature of a writ of error, to examine the legality of the commitment. (*Ex parte Watkins*, 3 Pet., 202.) And the issuing the writ and the action upon it are the exercise of appellate jurisdiction. (*Ex parte Bollman*, 4 Cr., 101; *Holmes v. Jennison*, 14 Pet., 621.) But whether the jurisdiction be appellate or special original, it is one and the same in each judge and court; and by whomsoever rightfully exercised, the effect and consequence are the same. *Yarborough v. The State*, 2 Tex., 522.

Can the judge go behind the return?

391. THE RETURN. Upon the return to a *habeas corpus*, whether before or after indictment, the judge is not confined to the proofs on commitment, or to the indictment, as to the question of guilt or innocence; but he hears the evidence according to the very truth of the case, and bails or recommits, in the exercise of a sound discretion. (*The People v. McLeod*, 1 Hill., 398; act of 1840, p. 32, §§ 5 and 6; 2 Kent's Comm., 30, 31.) And that discretion will not be revised by an appellate court, as well because it is the exercise of discretion as because such a judgment is only interlocutory, and not final. (*King v. Marks*, 3 East., 157; *Yates v. The People*, 6 Johns., 421; *Holmes v. Jennison*, 14 Pet., 622, 623.) *Yarborough v. The State*, 2 Tex., 523, 524.

An appeal in *habeas corpus* cases is restricted to the applicant. (*Weddington v. Sloan*, 15 B. Monr., 147; *Bell v. The State*, 4 Gill., 304; *Wade v. Judge*, 5 Ala., 130; *Barry v. Marcein*, 5 How., 103; *How v. The State*, 9 Miss., 690; *Ex parte Perkins*, 5 Cal., 424. *Per contra*, *Holmes v. Jennison*, 14 Pet., 540; *Ex parte Lafonta*, 2 Rob., 495; *Yates v. The People*, 6 John., 338.) *McFarland v. Johnson*, 27 Tex., 106.

What is the rule in contempt cases?

392. CONTEMPT. Although an appellate court will not, in general, revise a judgment for contempt, yet if the inferior court had no jurisdiction, or exceeded its jurisdiction in making the order for imprisonment, it will revise the ruling and discharge the prisoner thus illegally committed for a contempt. (*Ex parte Adams*, 25 Miss., 883; *Ex parte Cohen*, 6 Cal., 318, 320.) *Holman v. The Mayor of Austin*, 34 Tex., 671, 672. For full texts see Paschal's Digest of Decisions, §§ 14,337-14,397. Substantially the same doctrine is taught in 13 Opinions, 451.

Who may suspend the writ?

393. "SHALL NOT BE SUSPENDED." This whole article of the Constitution is devoted to the legislative department of the Government, and has no reference to the executive department. And this clause is immediately followed by an enumeration of certain subjects to which the powers of legislation shall not extend. Congress is the conclusive judge as to whether the public safety does or does not require the suspension. The second article does not confer on the President the right to suspend the writ. And considering the

Vth and VIth amendments, I can see no ground in any emergency for supposing that the President may authorize the suspension of the writ of *habeas corpus* or the arrest of a citizen except in aid of the judicial power. From the earliest history of the common law if a person was imprisoned, no matter by what authority, he had the right to the writ of *habeas corpus* to bring his case before the king's bench; if no sufficient warrant of commitment had been sent with him he was entitled to his discharge. The contests from the time of *Magna Charta* were ended by the statute of Charles II, commonly called the *habeas corpus* act. The statute was remedial, but it gave no new right. (3 Bl. Comm., 33, 34; 3 Hallam Court History, 19.) The right to suspend the writ belongs to the legislature in England and America. (1 Bl. Comm., 136; 3 Story's Comm., § 1336.) *Ex parte Merriman*, Taney's C. C. Decisions, 255-270. And see Paschal's Dig. of Decisions, §§ 14376, 14397. But President Lincoln refused to obey the writ and continued to suspend it until Congress by act gave him the power to do so. (12 Stat., 755; 13 Stat. 734.) The Chief Justice had the better of the argument, but the President, like Jefferson Davis at Richmond, acted upon his notions of necessities of the case.

Who may suspend.

394. BY WHAT LAW GOVERNED. The proceedings are not governed by the laws of the States, but by the common law of England as it stood at the adoption of the Constitution, subject to such alterations as Congress has prescribed. (*Ex parte Watkins*, 3 Pet., 193; *Ex parte Randolph*, 2 Brock. C. C., 447.) Therefore no court or judge is bound by the decision of any other judge in refusing the writ or discharge, but every judge may act upon his own independent judgment. (*Ex parte Partington*, 13 Mees. & W., 679; Canadian Prisoners' Case, 5 Id., 32, 47; *Rex v. Suddis*, 1 East, 306, 314; *Burdett v. Abbott*, 14 Id., 91; *Leonard Watson's Case*, 9 Ad. & Ell., 731.) *Ex parte Kaine*, 3 Blatch. C. C., 5.

What law governs?

395. WHERE THERE IS CONFLICT OF UNITED STATES AND STATE JURISDICTION. Upon the principles and reasoning in *Ableman v. Booth*, and *The United States v. Booth*, (21 How., 506,) a State court cannot, upon *habeas corpus* or any other process, release a party held in custody by an officer of the United States. Whenever any conflict arises between the State and United States authorities, those of the national Government must have supremacy until the validity of the different enactments and authorities can be determined by the authorities of the latter. And hence while a State court may issue a writ of *habeas corpus* upon the allegation of illegal imprisonment, yet if it appear to the applicant that the party is imprisoned upon the authority of the United States; or if, upon examination of the officer's return, it be made so to appear, the State judge shall proceed no further. The officer upon whom the writ is served should make a full

If there be conflict of jurisdiction?

Authority. return, so as to show the authority or color of authority for the detention. Enlisted soldiers are within these rules, and a State judge cannot discharge them upon a *habeas corpus*. Tarble's Case, 13 Wall., 401-412.

May there
be appeal?

396. NO APPEAL LIES. And because of the concurrence of jurisdiction in *habeas corpus* cases, and because the judgment of refusal is but interlocutory, and because action upon the evidence rests in the sound discretion of the court, an appeal or writ of error from the decision refusing bail does not lie, in the absence of a statute expressly allowing the appeal. (Holmes v. Jennison, 14 Pet., 562-623; Grayson v. Virginia, 3 Dallas, 321; United States v. Moore, 3 Cr., 173; Durosseau v. The United States, 6 Cr., 312; *Ex parte* Kearney, 7 Wheat., 45; Yates v. The People, 6 Johns., 337.) But the party may bring a second *habeas corpus* before the same Supreme Court. Yarborough v. The State, 2 Tex., 526-559; The State v. Daugherty, 5 Tex., 3, 4; *Ex parte* Coupland, 26 Tex., 390. [See Paschal's Digest of Decisions, Appeal and Error, §§ 2502, 2522-2527, 2679, 3511.]

Bill of
attainder?
142.

³No Bill of Attainder or ex post facto Law shall be passed.

Define bill
of attaind-
er.

397. "BILL OF ATTAINDER." (See note 142.) Bills of attainder were acts of Parliament whereby sentence of death was pronounced against the accused. Courts of justice were employed only to register the edict and carry the sentence into execution. Bills of pains and penalties were acts denouncing milder punishments. The term "bill of attainder" in this Constitution is generic, and embraces both classes. (2 Woodson's Lectures, 622-624; Gaines v. Buford, 5 Dana, 509; Story's Constitution, § 1344; *Ex parte* Garland, 4 Wall., 324; Drehman v. Stifle, 8 How., 601.) A provision of the constitution of Missouri, which enabled those sued for the exercise of military power during the rebellion to plead the Constitution in bar is not a bill of attainder, but in the nature of an indemnity act. (Rowland on the English Constitution, 563; 2 May, 267, 324.) Drehman v. Stifle, 8 Wall., 601.

The confiscation act of 1862 has two distinct parts, each having a separate object. The first four sections provide for the punishment of treason and rebellion as criminal cases, and are permanent. The remaining sections provide for the confiscation of the property of certain designated parties as enemies' property, and are permanent. (Miller v. The United States, 11 Wall., 268.) If defense be made the case is tried by jury; if none, by the court. If there be intervenors who set up liens, collateral proceedings are had suitable to the case. (Garnett's Case, 11 Wall., 257; McVeighs, Id., 266; Miller's Case, Id., 268; The Union Insurance Co., 6 Wall.,

763; *Armstrong's Foundery*, 6 Wall., 769; *Hart's Case*, 6 Cases. Wall., 770.) *The Confiscation Cases*, 1 Wood, 328, 329.

398. "OR EX POST FACTO LAW SHALL BE PASSED." What is an *ex post facto* law? 156.

The words *ex post facto* imply that something has been done, after some other thing, in relation to the latter. The use of these words, as descriptive of a law, is nominally confined to the criminal law. Such a law is defined to be one which renders the act punishable in a manner it was not when committed. It extends to laws passed after the act, affecting the person by punishment for the act in his person or estate. (*Calder v. Bull*, 3 Dallas, 386, 390; *Strong v. The State*, 1 Blackf. Ind., 193; *Satterlee v. Matthewson*, 2 Pet., 413.) It applies exclusively to criminal or penal and not to civil cases. (*Sedg. Const. Law*, 356; *Coffin v. Lunt*, 2 Pick., 72; *Commonwealth v. Phillips*, 11 Pick., 28; *Calder v. Bull*, 2 Root, 350; *Fisher v. Cockerill*, 5 Monr., 135; *Locke v. Dane*, 9 Mass., 363; *Woart v. Winnicke*, 3 N. H., 475; *Dash v. Van Kleeck*, 7 Johns., 488; *Commonwealth v. Lewis*, 6 Binney, 271; *Scroggin v. Scroggin*, 1 J. J. Marsh., 363; 2 Pet. App., 681.) *Bender v. Crawford*, 33 Tex., 751; *Watson v. Mercer*, 8 Pet., 110; *Carpenter v. Pennsylvania*, 17 How., 463; *Fletcher v. Peck*, 6 Cr., 138; *Society for the Propagation of the Gospel v. Wheeler*, 2 Gall., 138; *United States v. Hall*, 2 Wash. C. C., 366; *Locke v. New Orleans*, 4 Wallace, 173. The terms retrospective and *ex post facto* are sometimes applied as synonymous, and retroactive laws are supposed to be prohibited under the inhibition of *ex post facto* laws; but the power to pass retrospective laws, properly so called, does exist in the several States, and they are obligatory if not forbidden by their own constitutions. (*Hess v. Werts*, 4 Serg. & R., 364; *Osborne v. Huger*, 1 Bay, 179; *Dash v. Van Kleeck*, 7 Johns., 477; *Bedford v. Shilling*, 4 Serg. & R., 405; *Commonwealth v. Duane*, 1 Binney, 601; *Moore v. Houston*, 3 Serg. & R., 159; *Ogden v. Blackledge*, 2 Cr., 272; *Satterlee v. Matthewson*, 2 Pet., 414; *Watson v. Mercer*, 8 Pet., 110; *Charles River Bridge v. Warren Bridge*, 11 Pet., 420; *Bennett v. Boggs*, 1 Bald., 74.) *Bender v. Crawford*, 33 Tex., 751.

How distinguished from retrospective? 142, 143.

Those provisions of the Constitution which deny to the legislature power to deprive any person of life, liberty, or property, without due process of law, or to pass a bill of attainder or an *ex post facto* law, are inconsistent in their spirit and general purpose with any provision which at once, without trial, deprives a whole class of persons of offices held by them for cause however grave. *In re Cæsar Griffin*, 25 Tex. Supp., 637. Lord Coke and all the judges, in Calvin's case, say that the citizen cannot be deprived of his rights by a matter *ex post facto*. (*Kelly v. Harrison*, 2. Johns. Cas., 29; *Jackson v. Lunn*, 3 Johns. Cas., 109; *Taber v. Perrott*, 9 Cr., 40; *United States v. Perchman*, 7 Pet., 86, 87; *Jones v. McMas-*

How as to property in office?

- Cases. ters, 20 How., 20; *White v. Burnley*, 20 How., 250; *McMullen v. Hodge*, 5 Tex., 34; 2 Kent's Comm., 56, 57.) *Kilpatrick v. Sisneros*, 23 Tex., 131. *Ex post facto* laws are such as create or aggravate crime, or increase the punishment, or change the rules of evidence for the purpose of conviction. *Calder v. Bull*, 3 Dallas, 390; *Cummings v. Missouri*, 4 Wallace, 326; *Shepherd v. People*, 25 N. Y., 406; *Holt v. The State*, 2 Tex., 364. *Dawson v. The State*, 6 Tex., 347.
- Define the term. 156. It was used in Justinian's time as a quaint phrase, just as in *ca. sa.* or writ, *in the pone*, or *quo minus* is used at the present day. (L. 34, Tit. 4, Law 15.) An *ex post facto* law is where, after an action, indifferent in itself, has been committed, the legislature then for the first time declares it to have been a crime. (1 Blackst. Comm., 46.) But *non constat*, that the definition excludes civil laws. *Clausula vel dispositio inutilis per præsumptionem vel causam remotam ex post facto non fulcitur*. For that if a compact be not in itself usurious, no matter *ex post facto* shall make it so. So where a deed is good in its creation, it may become void *ex post facto* by vagueness, &c. (*Shepherd's Touchstone*, 63, 68, 20; *Bulstrode*, 1715, B a, p. 416.) And the performance of something *ex post facto* within the realm, in pursuance of a preceding contract, &c., doth not make it cease to be maintained. (*Godolphin's Views of Admiralty*, 109.) *Wilkinson v. Leland*, 2 Pet. App., 681. [These were views of Mr. Justice Johnson, to show that restricting the term to criminal laws was too narrow a view.] *Paschal's Digest of Decisions*, §§ 12143-12159.
- Give its origin. A law changing the place of trial from one county to another county in the same district, or even to a different district from that in which the offense was committed or the indictment found, is not an *ex post facto* law, though passed subsequent to the commission of the offense or the finding of the indictment. An *ex post facto* law does not involve a change of the place of trial of an alleged offense after its commission. *Gut v. Minnesota*, 9 Wall., 38, 40.
- What of a law changing the place of trial? 'No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.
- What of a capitation or direct tax? 144. 302. Exports. 'No Tax or Duty shall be laid on Articles exported from any State.
- Preference and duties. 146. 'No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.

⁷No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

Appropriations and accounts.
149.

⁸No title of Nobility shall be granted by the United States; and no Person holding any office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any Present, Emolument, Office, or Title of any Kind whatever, from any King, Prince, or foreign State.

Titles of nobility.
150, 151.

Emoluments.

SECTION 10. ¹No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

What are the absolute inhibitions upon the States?
152-161.

399. "EMIT BILLS OF CREDIT." The bills of State banks, although in reality based upon securities furnished by the State, are not bills of credit. (*Briscoe v. The Bank of the Commonwealth of Kentucky*, 11 Pet., 257; *Woodruff v. Trapnall*, 10 How., 205; *Curran v. Arkansas*, 15 How., 315; *Darlington v. The Bank of Alabama*, 13 How., 12; 1 Kent's Comm., p. 409, 10th ed., note A.) *Veazie Bank v. Fenno*, 8 Wall., 552, 553. At first it read "without the consent of Congress." *Metropolitan Bank v. Van Dyck*, 27 N. Y., 422.

What are bills of credit?
154.

400. "IMPAIRING THE OBLIGATION OF CONTRACTS." To entirely annihilate the remedy is an impairment of the contract. (*Calder v. Bull*, 3 Ball, 388.) A State can no more impair a contract by its constitution than by a statute. The homestead exemption of Georgia, as to anterior contracts, is void; and the fact that the constitution was adopted under the reconstruction laws makes no difference. Georgia, notwithstanding secession, remained a State in the Union. *Gunn v. Barry*, 15 Wall., 622, 623.

How are the obligations of contracts impaired?

If a contract be valid by the laws of the State when entered into, no decision of the highest courts of the State subsequently made can impair its obligation. *Chicago v. Sheldon*, 9 Wall., 50, 55, 56; *The City v. Samson*, 9 Wall., 485.

When may they not be impaired?
157.

After the rendition of judgment the legislature cannot so change the law as to destroy the contract or prevent the

enforcement of the judgment. (*Bronson v. Kinzie*, 1 How., 297; *McCracken v. Hayward*, 2 How., 608; *Van Hoffman v. The City of Quincy*, 4 Wall., 557; *Swift v. Tyson*, 16 Pet., 19; *Jefferson Br. Bk. v. Skelley*, 16 Pet., 19; *Riggs v. Johnson Co.*, 6 Wall., 166.) *Butz v. City of Muscatine*, 8 Wall., 583, 584.

The remedy.
161.

Those decisions which deny that the remedy forms a part of the contract are not sound. The Sequestration Cases, 30 Tex., 696. The Texas stay laws impaired the obligation of contracts, and that, therefore, they were unconstitutional. *Id.*, 699; *Jones v. McMahan*, 30 Tex., 732-735. See a collection of the cases in 5th American Law Register, 732. By annexation Texas adopted the Constitution of the United States and the interpretations by its supreme judiciary. *Jones v. McMahan*, 30 Tex., 734. 735.

The Federal decisions rule.

Contracts valid when made continue valid, and capable of enforcement, so long at least as peace lasts between the governments of the contracting parties, notwithstanding a change in the conditions of business which originally led to their creation. *Railroad Co. v. Richmond*, 19 Wall., 589.

The whole estate.

Where an estate was settled upon trustees with use for life, remainder in fee, and all parties who could appear did personally and by guardian go before the legislature and agree to private acts, changing the direction of the estate to some extent, and authorizing the chancellor to appoint new trustees, and the chancellor directed what part of the estate should be sold, and afterwards directed another line to be run and a sale to be made, so as to make the life estate available, the sales were upheld against the argument that the private legislation impaired the obligation of contracts. (*Sinclair v. Jackson*, 8 Cow., 579; *Cochran v. Van Surlay*, 1 Wend., 439; *Towle v. Forney*, 14 New York, 428; *Williamson v. Berry*, 8 How., 495; *Suydam v. Williamson*, 20 How., 429; *Same v. Same*, 24 How., 427.) *Suydam v. Williamson*, 6 Wall., 728.

In these cases the Supreme Court of the United States yielded to the principle of that court to follow the State courts as to the law of property and the interpretation of the State constitutions.

Are bank notes contracts?
Page 157,
note 157.

"CONTRACTS." The case of *Curran v. Arkansas*, (15 Wall., 304,) approved. Where by a bank charter the assets of the bank are to be applied to the redemption of its bills or payment of its debts, the State has no right to apply them to other purposes. *Barings v. Dabney*, 19 Wall., 11. And see *Furnam v. Nichols*, 9 Wall., 62.

Retroactive laws.
What are the rights of the States to pass retro-

Where the constitution of a State does not prohibit it, a municipal corporation may be empowered to donate its bonds to a railroad company and collect taxes for the payment of the bonds. *Town of Queensbury v. Culver*, 19 Wall., 90, 91.

The right of a State legislature to pass retroactive laws, where there is no inhibition in the constitution of the State,

provided they do not impair the obligation of the contract, and are not *ex post facto* in their character, is too well settled to admit of doubt. (Williamson *v.* Leland, 2 Pet., 627; Watson *v.* Mercer, 8 Pet., 88; Satterlee *v.* Matthewson, 2 Pet., 380; Society *v.* Pawlett, 4 Pet., 480; Railroad *v.* Nesbit, 10 How., 401; Albee *v.* May, 2 Paine, 74; Andrews *v.* Russell, 7 Blackford, 475.) Drehman *v.* Stifle, 8 Wall., 603.

active
laws?

401. "EXEMPTIONS." "ALL PROPERTY OF SAID CORPORATION shall be exempt from taxation" used in the charter of a charitable institution are words of contract. And a future legislature cannot repeal such an exemption. Home of the Friendless *v.* Rouse, 8 Wall., 436, 437; Washington University *v.* Rouse, Id., 439. Justices Miller and Field and the Chief Justice dissenting on the ground that one legislature cannot bind future legislatures. Id., 441.

The ex-
emption
laws.

402. THE REMEDY. The legislature may pass a law regulating the remedy after a suit has been instituted. And if a suit be in a State court against a State, under a State law authorizing such suit, the legislature may impose new terms upon the plaintiff, and might even abolish the law authorizing such suit, and thus effect its dismissal. Beers *v.* Arkansas, 20 How., 528-530.

How of
laws affect-
ing the
remedy?
157.

The statute of limitation belongs to the remedy, not the right; and a change of legislation, which lengthens the time or deducts certain years is not subject to constitutional objection. Indeed, the convention had the power to disregard vested rights; and, if the people ratified, such changes had no restriction except in the federal Constitution. (McMullen *v.* Hodges, 5 Tex., 73; Oliver, Lee & Co's Bank, 21 N. Y., 12; Dash *v.* Van Kleeck, 7 Johns., 477; Smith's Com. on Stat. and Const. Law, 166-168; Sedgwick on Const. Law, §§411, 412, 682, 683, 692, 693; Ang. on Lim. §§66, 67; Goshen *v.* Stonington, 4 Conn., 209; In the matter of the Reciprocity Bank, 22 N. Y., 12.) But it would seem that the suspension of the statute must be general, and not for particular cases. (Holden *v.* Jones, 11 Mass., 396; Davison *v.* Johonot, 7 Met., 397; Bull *v.* Conroe, 13 Wis., 238-244.) Bender *v.* Crawford, 33 Tex., 750-751, 756-761.

²No State shall, without the consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws; and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws

State the
restrictions
upon the
States as to
imposts,
&c.
162-164.

Revision. shall be subject to the Revision and Controul of the Congress.

Define imports?

403. "IMPOSTS AND IMPORTS" are used exclusively with reference to articles imported from foreign countries. But there was no intention to prevent a State from taking articles brought to it from another State. The case of *Almy v. California*, 24 How., 173, is reconcilable with this opinion. *Woodruff v. Parham*, 8 Wall., 131-137. It would seem that the tax should not discriminate against the products of the exporting State. *Id.*, 140. The License Cases, 5 How., 504, decided no principle; certainly they did not contravene this. *Id.*; *Hirson v. Lott*, 8 Wall., 150.

What are the mutual rights of taxation, State and Federal?

404. Certain subjects of taxation are withdrawn from the States by necessary implication. The Federal Government cannot destroy or embarrass the State governments, nor the States hinder the powers which belong to the national Government; but a tax which affects the latter separately is not inhibited. The States and national Government must coexist. *Railroad Company v. Peniston*, 18 Wall., 31.

The property of an agent of the Government may be subject to taxation; but the State cannot destroy an instrumentality of the Union, such as requiring a State stamp upon bills of the United States Bank. Such is not like a tax upon the real estate and other property of the bank, but it is a tax upon the operations of an instrument of the Union to carry its powers into execution. (*McCulloch v. Maryland*, 2 Pet., 467.) It is the distinction between the property of an agency and its action. (*Osborn v. The Bank of the United States*, 9 Wheat., 738.) And this distinction was recognized. *The National Bank v. The Commonwealth of Kentucky*, 9 Wall., 353; *Railroad Company v. Peniston*, 18 Wall., 34-36.

All subjects to which the sovereign power of a State extends are subjects of taxation; others are exempt. That sovereignty extends to everything which exists by its own authority or is introduced by its permission, but not to those means which are employed by Congress to carry into execution powers conferred on that body. Such attempt of use by a State is an abuse. The States have no power to tax or control the constitutional laws of Congress. (*Weston v. Charleston*, 2 Pet., 466.) *Railroad Company v. Peniston*, 18 Wall., 38.

Tax upon capital.

A tax upon the capital of a national bank is a tax upon the bank, and when it is invested in the securities of the Government it cannot be taxed, nor can the corporation be taxed as the owner of such securities; but the shareholders or stockholders (which terms are synonymous) may be taxed on their stocks or shares, although all the capital of the bank be invested in Federal securities. *National Bank v. Com-*

monwealth, 9 Wall., 359; *Van Allen v. Assessors*, 3 Wall., Tax. 573; *Bradley v. The People*, 4 Wall., 459.

405. LIQUOR. A tax of fifty cents a gallon on liquor, imported from another State, being the same rate imposed upon liquor manufactured in Alabama, is constitutional. But this does not depend upon the concurrent power of the States to regulate commerce between the States. *Hinson v. Lott*, 8 Wall., 152. Tax upon liquor.

It is settled that merchandise in the original packages once sold by the importer is taxable as other property. (*Pervear v. Commonwealth*, 5 Wall., 479.) *Waring v. The Mayor*, 8 Wall., 122.

406. "EXCEPT WHAT MAY BE ABSOLUTELY NECESSARY FOR EXECUTING ITS INSPECTION LAWS." This power is not affected by the power to regulate commerce. *Steamship Company v. Postwardens*, 6 Wall., 33. The exception.

³No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of Delay. State the inhibitions on tonnage &c.

407. "LAY ANY DUTY OF TONNAGE." A State may provide for the health of its people, and although this power may affect commerce, yet such State laws are not enacted for such object; but for the sole purpose of preserving the public health, and they may be controlled by Congress. (*Gibbons v. Ogden*, 9 Wheat., 203.) Such laws, if they levy a tonnage tax for quarantine purposes are unconstitutional. (*Paschal's Dig.*, art. 7345; *State Tonnage Cases*, 12 Wall., 204.) *Peete v. Morgan*, 19 Wall., 581-584. The Constitution contains no express restriction upon the power of the States to tax other than is found in this third clause. In respect to property, business and persons within their respective limits, the power of the States remains entire, notwithstanding the Constitution. The power is concurrent with the General Government, and in case of a tax upon the same subject by both governments the claim of the latter is supreme; with this qualification, the power of the States is absolute. (*Lane county v. Oregon*, 7 Wall., 77.) *Railroad Company v. Peniston*, 18 Tex., 29. State the rule as to health and quarantine?

Tonnage, as applied to American ships and vessels, means the entire cubical capacity or contents of the ship or vessel expressed in tons of one hundred cubical feet each, as estimated and ascertained by those rules of admeasurement and Define tonnage.

Tonnage. computation. (*Alexander v. Railroad*, 3 Strobhart, 598.) It is an official term intended originally to express burden that a ship would carry, in order that the various dues and customs which are levied upon shipping might be according to the size of the vessel or in proportion to her capability of carrying burden. Hence, as applied to a ship, the term has become almost synonymous with size. (*Roman's Com. and Nav. Tonnage*.) *State Tonnage Tax Cases*, 12 Wall., 212, 225.

The limitations. A State, without the consent of Congress, cannot lay any duty of tonnage, nor levy duties on imports or exports, except what may be necessary for their inspection laws. And it makes no difference that the owners of the vessels are citizens of the State which levies the tax. The prohibition is general, and it withdraws altogether from the States the power to lay any duty on tonnage under any circumstances without the consent of Congress. (*Gibbons v. Ogden*, 9 Wheat., 202; *Sinnot v. Davenport*, 22 How., 238; *Foster v. Davenport*, 22 How., 245; *Perry v. Torrence*, 8 Ohio, 524; *The Passenger Tax Cases*, 7 How., 447, 481.) *State Tonnage Cases*, 12 Wall., 214; *Peete v. Baldwin*, 19 Wall., 582-584.

Tonnage duties are as much taxes as duties on imports or exports; to which the prohibitions of the Constitution equally extend. Hence ships and vessels employed in conducting commerce from one State to another are entitled to the privileges of ships and vessels employed in the coasting trade. (8 Stats., 287, 305; 3 Kent Com., 11 ed., 303.) *State Tonnage Tax Cases*, 215.

ARTICLE II.

How is the executive power vested?

165.

SECTION 1. ¹The Executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows:

How far may each department of the government decide upon the constitutionality of a law?
Jefferson.

408. "THE EXECUTIVE POWER." Mr. Jefferson says: "The second question, whether the judges are invested with exclusive authority to decide on the constitutionality of a law, has been heretofore a subject of consideration with me in the exercise of official duties. Certainly there is not a word in the Constitution which has given that power to them more than to the executive or legislative branches. Questions of property, of character, and of crime, being ascribed to the judges, through a definite course of legal proceedings—laws involving such questions belong of course to them, and as they decide on them ultimately and without appeal, they of course decide *for themselves*. The constitutional validity of the law or laws prescribing executive action, and to be

administered by that branch ultimately and without appeal, the executives must decide for *themselves*, also, whether, under the Constitution, they are valid or not. So, also, as to laws governing the proceedings of the legislature; that body must judge *for itself* the constitutionality of the law, and, equally, without appeal or control from its co-ordinate branches. And, in general, that branch which is to act ultimately and without appeal, on any law, is the rightful expositor of the validity of the law, uncontrolled by the opinions of the other co-ordinate authorities." Jefferson.

President Jackson, in his veto message upon the bank bill, uses this language: "If the opinion of the Supreme Court covered the whole ground of this act, it ought not to control the co-ordinate authorities of this Government. The Congress, the executive, and the court, must each for itself be guided by its own opinion of the Constitution." Jackson.

Mr. Van Buren said: "Everybody knows that an act which is contrary to the Constitution is a nullity, although it may have passed according to the forms of the Constitution. That instrument creates several departments, whose duty it may become to act upon such a bill in the performance of their respective functions. The theory of the Constitution is, that these departments are co-ordinate and independent of each other, and that when they act in their appropriate spheres, they each have a right, and it is the duty of each to judge for themselves in respect to the authority and requirements of the Constitution, without being controlled or interfered with by their co-departments, and are each responsible to the people alone for the manner in which they discharge their respective duties in that regard. It is not, therefore, to be presumed that that instrument, after making it the President's especial duty to take an oath to protect and uphold the Constitution and prevent its violation, intended to deny to him the right to withhold his assent from a measure which he might conscientiously believe would have that effect, and to impose upon him the necessity of outraging his conscience by making himself a party to such a violation." Stanberry, 2 Trial of the President, pp. 37-66; Martin v. Mott, 12 Wheat., 19. Van Buren.

The English definition cannot be consulted; for in England the power of Parliament over the Crown is unlimited. Like the legislative and judicial power, the executive power is limited to the faculties set forth in the Constitution. The words are but captions or heads of chapters. It is but the style of the officer who is to possess the power. England.

The power of appointment and removal are not executive powers. Senator Howard, 3 Trial of the President, 33, 34. Howard.

It is that power, and no other, which the Constitution grants to him. Senator Edmunds, 3 Id., 83. Edmunds.

To appoint and to remove from office are executive powers, and conferred by this clause; but the mode of appointment is limited by future clauses, while this general provision Davis.

Removal. leaves the power of removal to the President alone. Senator Garrett Davis, 3 Trial of the President, 163.

But the President cannot remove a judge, but the Senate only, in the exercise of a judicial power. Therefore, as to judges, the limitation seems to be as complete in the matter of removal as in that of appointments.

For what term?

409. "DURING THE TERM OF FOUR YEARS." The term of the President is the period of his actual service. Upon the Vice President or another becoming President upon any of the contingencies, the term is his. Senator Fowler, 3 Trial of the President, 196. And so argued Senator Trumbull. Id., 321. The clause does not mean that the *person* holding the office shall not die, resign, or be removed during that period, but to fix a *term* or limit during which he may, but beyond which he cannot, hold the office. Upon the happening of either of the contingencies, the term ceases, so far as the late incumbent is concerned. The *term* of the presidential office is four years, but different persons may fill it during that period. Senator Trumbull, 3 Id., 322.

Mode of election.

²Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

409a. TABLE SHOWING THE "NUMBER OF ELECTORS" OF THE SEVERAL STATES IN 1876.

1876.	Alabama	10	Missouri	15
	Arkansas	6	Nebraska	3
	California	6	New Hampshire	5
	Colorado	3	New Jersey	9
	Connecticut	6	New York	35
1876.	Delaware	3	Nevada	3
	Florida	4	North Carolina	10
	Georgia	11	Ohio	22
	Illinois	21	Oregon	3
	Indiana	15	Pennsylvania	29
	Iowa	11	Rhode Island	4
	Kansas	5	South Carolina	7
	Kentucky	12	Tennessee	12
	Louisiana	8	Texas	8
	Maine	7	Vermont	5
	Maryland	8	Virginia	11
	Massachusetts	13	West Virginia	5
	Michigan	11	Wisconsin	10
	Minnesota	5		
	Mississippi	8	Total	366

It will be seen that this table includes Colorado, which possibly may not vote in 1876. But the public takes it for granted that it will. If so, it will require 186 electoral votes to choose.

[ARTICLE XII.—AMENDMENT.

¹The Electors shall meet in their respective States, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same State with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the Government of the United States, directed to the President of the Senate; the President of the Senate shall, in presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted; the person having the greatest number of votes for President shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of all the States shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve

Repeat the whole rule as to electing and making known the presidential election.

168.

No choice. upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President.

The highest votes.

²The person having the greatest number of votes as Vice-President shall be the Vice-President, if such number be a majority of the whole number of Electors appointed; and if no person have a majority, then from the two highest numbers on the list the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice.

Eligibility.

³But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.]

410. "THE VOTES SHALL THEN BE COUNTED. THE PRESIDENT OF THE SENATE SHALL, IN THE PRESENCE OF THE SENATE AND HOUSE OF REPRESENTATIVES, OPEN ALL THE CERTIFICATES, AND THE VOTES SHALL THEN BE COUNTED."

How are the votes counted?

The prevalent opinion in the earlier days of the Government was that Congress were the mere witnesses of the count, but the present practice can best be illustrated by the precedent of 12th February, 1873. At the hour of one o'clock, after due notice that the House was ready, the Senate proceeded in a body to the House. Then Mr. Sherman acted as teller for the Senate, and Mr. Dawes, Mr. Beck, and others as tellers for the House, the Vice President presiding and the Speaker of the House seated at his left hand. The counting and recording of the vote proceeded regularly until the certificate of the vote of the electors of Georgia had been read by the tellers, when Mr. Hoar put in the following written objection :

Objection of Mr. Hoar.

"Mr. Hoar objects that the votes reported by the tellers as having been cast by the electors of the State of Georgia for Horace Greeley, of New York, cannot lawfully be counted, because said Horace Greeley, for whom they appear to have been cast, was dead at the time said electors assembled to cast their votes, and was not 'a person' within the meaning of the Constitution, this being an historic fact of which the two Houses may properly take notice."

Some objections also having been stated to the vote of Mississippi, the Senate, under the 22d joint rule, withdrew.

In the Senate the part of the joint rule bearing upon the determination of the question was read as follows :

"If, upon the reading of any such certificate by the tellers, any question shall arise in regard to counting the votes therein certified, the same having been stated by the presiding officer, the Senate shall thereupon withdraw, and said question shall be submitted to that body for its decision; and the Speaker of the House of Representatives shall, in like manner, submit said question to the House of Representatives for its decision; and no question shall be decided affirmatively, and no vote objected to shall be counted, except by the concurrent votes of the two Houses, which being obtained, the two Houses shall immediately reassemble, and the presiding officer shall then announce the decision of the question submitted, and upon any such question there shall be no debate in either House; and any other question pertinent to the object for which the two Houses are assembled may be submitted and determined in like manner."

What is the 22d rule?

After some amendments offered by Mr. Conkling, giving the reasons for action, and striking out the word "not," on motion of Mr. Sherman a resolution of Mr. Edmonds was passed in these words :

Difference between the Senate and House.

"*Resolved*, That the electoral vote of Georgia cast for Horace Greeley be counted."

The House retained the word "not" in its resolution; so the two Houses disagreed as to whether electoral votes cast for a candidate who died after a popular election, or, more properly, perhaps, they disagreed as to whether the Houses had the power to determine the question. But the result of the disagreement under the rule was that the three votes cast for Mr. Greeley were not counted. The Vice President stated that by a precedent four years ago it was not necessary that the resolution should be concurrent, but the decisions must accord.

"Mr. Trumbull objects to counting the votes cast for President and Vice President by the electors in the State of Mississippi, for the reason that it does not appear from the certificate of said electors that they voted by ballot."

Mississippi.

This objection was not urged by Mr. Trumbull, and the votes of Mississippi were counted.

The vote of Arkansas was not counted, because the certificate was not under the seal of the State, but the seal of the Secretary of State. The two Houses failing to concur, the vote of this State was not counted. From Louisiana there were two sets of returns: one signed by the Governor and regular upon its face, the other by a returning board. But there had been a report from a committee of the Senate, showing that the Grant board certified without returns, and the other without a legal count. Both Houses resolved

Arkansas.

Result.

against counting Louisiana. So it resulted that three votes of Georgia were not counted, and all the votes of Arkansas and Louisiana were not counted.

The precedents are—1. That under the joint rule the two Houses may judge as to the existence of the person voted for, which goes to the qualifications. 2. They may reject votes for irregularity of the proceedings and certificates from the States.

The result was that of the 366 electoral votes, Grant and Wilson got 286, and all others 63. The Vice President declared Grant and Wilson elected President and Vice President.

What are
the qualifi-
cations for
President?
169, 170.

⁴No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty-five Years, and been fourteen Years a Resident within the United States.

Vacancy of
presiden-
tial chair.

⁵In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation, or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

What de-
volves upon
the Vice-
President?
172.
318.

411. "IN CASE OF THE REMOVAL OF THE PRESIDENT FROM OFFICE, OR OF HIS DEATH, RESIGNATION, OR INABILITY TO DISCHARGE THE POWERS AND DUTIES OF THE SAID OFFICE, THE SAME SHALL DEVOLVE UPON THE VICE PRESIDENT." * * * "What shall devolve upon the Vice President? The powers and duties of the office simply, or the office itself? Some light is thrown upon this question by the remainder of the same clause, making provision for the death, &c., of both the President and Vice President, enabling Congress to provide by law for such a contingency, as to declare 'what officer shall *act as President*,' and that 'such officer shall *act accordingly*'—a very striking change of phraseology. The question has, however,

in two previous instances received a practical construction. Remarks.
In the case of Mr. Tyler, and again in that of Mr. Fillmore, the Vice President took the oath as President, assumed the name and designation, and was recognized as constitutionally President of the United States, with the universal assent and consent of the nation. Each was fully recognized and acknowledged to be President, as fully and completely, and to all intents, as if elected to that office." Senator Fessenden, 3 Johnson's Trial, 20.

The first clause provides for the "term" of four years, and for a like "term" for the Vice President. It is the "duties" or "office," not the "term," which devolves upon the Vice President. He can only serve for the unexpired term. Senator Edmonds, 3 Trial of the President, 87.

412. "AND THE CONGRESS MAY BY LAW PROVIDE," &c. This and the power of impeachment are the only modes of getting rid of officers whose *inability* or *insanity*, or otherwise renders them unfit to hold office, and whose every official act will necessarily be a misdemeanor. Mr. Lawrence, 1 Trial of the President, 135. But the editor thinks that the clause relates to the power to provide for the contingency which may befall both President and Vice President, and not the getting rid of either. Power of Congress?

⁶The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them. What of the President's compensation? 173.

413. "AT STATED TIMES:" That is, at the times fixed by law for payment, which has been quarterly. Give the precedents.

"COMPENSATION, WHICH SHALL NEITHER BE INCREASED NOR DIMINISHED DURING THE PERIOD FOR WHICH HE SHALL HAVE BEEN ELECTED." It will be observed that George Washington was necessarily *elected* before any compensation had been fixed, because it was before the Government had been organized. And he was inaugurated 4 March, 1789, and his compensation was not fixed until 18 Feb., 1793, which was after he had been a second time *elected*, but before he had renewed his oath of office. But as nothing had before been prescribed, this was neither an increase nor diminution, and therefore the words *period* and *elected* could have no force. But Ulysses S. Grant was elected on the first Tuesday in November, 1868, inaugurated 4 March, 1869; again *elected* on the first Tuesday in November, 1872; his Washington. Grant.

Election
declared.

second election declared on the first Wednesday in December of the same year, and on 3 March, 1873, Congress increased his *compensation* from twenty-five to fifty thousand dollars per annum. This was in an amendment to the appropriation bill, in which was also increased the salaries of members of Congress, and, as to them, it was declared that the law should operate retroactively as to the compensation of that Congress. (17 Stat., 486.) The President's salary only took effect during his second "term," or second "period" for which he had "been elected." This is a congressional precedent for the proposition that "*period*" in this clause is synonymous with "term" in clause 1 of the same article, and after the election has been declared the same person re-elected may have his compensation increased for the next period of his office. This limits "SHALL HAVE BEEN ELECTED" to the THEN TERM of service, and it impairs, if it does not destroy, the accepted definition of the word *period*.

Sumner.

It was the opinion of the Hon. Charles Sumner that all such increase of salary ought to be fixed before the popular election of a future incumbent, because a leader is never so powerful as in the hour of his first triumph before the people. Minds are too prone to look at the mere inauguration of the President as the whole matter of the election. But the popular speech to the assembled nation, the marching under arches to martial music, the firing of cannon, the regal ball, and the mad prostration for office, are things not contemplated by the Constitution. The only thing of substance is the oath of office, which might be administered by any judicial officer elsewhere as well as at Washington.

Install-
ment.

In the case of the increase of President Grant's salary the popular indignation was so furious at the members of Congress who doubled and made retroactive the increase of their own salaries, that the irregularity of augmenting the President's was little noticed. The Senate has now passed a bill to return to twenty-five thousand dollars per annum.

354.

Oath.
Page 170,
note 174.

⁷Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:

"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

414. The oath is to be taken in connection with the duty to take care that the laws be faithfully executed. Both need only be done in good faith. Curtis in defense of the President, Trial of the President, 386.

189.

SECTION. 2. 'The President shall be Commander-in-Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the Executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.

State the powers of the President?
175, 177.

415. "COMMANDER-IN-CHIEF." The commission of General Washington of 17 June, 1775, was by the delegates of all the United Colonies, naming them, to GEORGE WASHINGTON, to be General and Commander-in-chief of the army of the United Colonies, &c., and was to be held until revoked by Congress. (Journal of 1774-1775, pp. 121, 122.) This is the only form of commission ever prescribed by law in this country to a military officer, and in drafting commissions under the Constitution of the United States "the pleasure of the President" was inserted instead of "the pleasure of Congress." Manager Butler, 1 Trial of the President, 718, 719.

How commissioned?

But it is to be observed that under the articles of confederation there was neither President nor judiciary, nor was there when Washington was commissioned any confederation—only a Congress, under the name of the United Colonies.

416. "HE MAY TAKE THE OPINION IN WRITING OF THE PRINCIPAL OFFICER OF EACH OF THE EXECUTIVE DEPARTMENTS UPON ANY SUBJECT RELATING TO THEIR RESPECTIVE DUTIES." Not as to the duties of other heads of departments, but only to the duties of the President and the department over which he presides. Curtis' speech in defense of the President, 1 Trial of the President, p. 380.

How does he take the advice of his Cabinet?

Manager Butler took Mr. Jefferson's view. The heads of department were never expected to be a cabinet. The advice was intended to be in writing, and to remain a record. 1 Trial of the President, p. 667.

The taking the opinion in writing was a mere redundancy of plan, as the right for which it provides would result from the office. (Federalist, 73.) Curtis in defense of the President, vol. 1, p. 669.

The practice of cabinet consultations as an advisory body originated with President Washington, and was continued by John Adams. With these administrations a consultation

Different precedents.

Jefferson. was held, after which the President decided. Jefferson's practice was to consult and take a vote, counting himself one of that vote. This was for the purpose of unanimity, for the President always understood that he had the power to overrule the result if he saw proper to exert it. 2 Curtis' History of the Constitution, 409; Curtis in defense of the President, 1 Johnson's Trial, 670.

After full discussion it was decided by Chief Justice Chase and a vote of the Senate that the President might prove what occurred in cabinet counsel on the 21st of February, 1868, after the President had appointed Thomas Secretary of War *ad interim*. 1 Johnson's Trial, 666-674.

Evidence. The President's counsel made the following offer: "We offer to prove that the President, at a meeting of the cabinet while the bill was before the President for his approval, laid before the cabinet the tenure-of-civil-office bill for their consideration and advice to the President respecting his approval of the bill; and thereupon the members of the cabinet then present gave their advice to the President that the bill was unconstitutional, and should be returned to Congress with his objections, and that the duty of preparing a message, setting forth the objections to the constitutionality of the bill, was devolved on Mr. Seward and Mr. Stanton, to be followed by proof as to what was done by the President and cabinet up to the time of sending in the message." This was objected to by the managers. After a very able discussion, in which the executive power was thoroughly examined and questions as to the effect of such advice were asked by Senators, it was ruled that the evidence was inadmissible. 1 Johnson's Trial, 676-693.

Mr. Curtis explained that the object was to show that the President was guilty of improper intent. *Id.*, 691, 692. The offer to prove that the cabinet advised before the veto that the civil tenure bill did not apply to the cabinet officers appointed by Mr. Lincoln, and that Stanton concurred in this view, was also voted down. *Id.*, 693-697.

So the consultations of the cabinet, in which a desire was expressed to get up a judicial case, was rejected. *Id.*, 698, 700.

State the
power as to
pardons.
Cox.
177.

417. TO GRANT REPRIEVES AND PARDONS. President Washington, by proclamation, pardoned the whisky insurrectionists of Western Pennsylvania. 12 Sparks' Washington, 135. And President Adams pardoned the Northampton insurrectionists. 9 Adams' Works, 168, 169.

Charles II issued a general proclamation of pardon from Breda, reserving to Parliament the right to make exceptions at its discretion. Hallam's Const. History of Eng., (Harper's Ed. of 1847,) p. 406; and see 5 Hume's History of Eng., p. 444, (London Ed. of 1848.) But general pardons are commonly made by act of Parliament. 2 Hawk. Pleas of Crown,

(London Ed. of 1726,) p. 384. President Johnson, in 1868, Johnson. issued a general proclamation of full pardon and amnesty. The effect of such a proclamation is established by precedent and authority, following the precedents set by Washington, 10 July 1795; John Adams, 2 May, 1800; James Madison, 16 Feb., 1815; Mr. Lincoln, 8 Dec., 1863, and of the same President 26 March, 1864, and of Johnson's proclamation 7 Sept., 1867. He declared that all the beneficiaries were restored to all their rights, privileges and immunities under the Constitution.

In the *Armstrong Foundry* case (6 Wall., 767) it was held Relief. that the pardon relieved the property and person of all penalties under a special law of the United States. Indeed there is no law so well settled by the courts as that which concerns the pardon of rebellious citizens. All rights are restored. The citizen is in the same condition as if he had never been rebellious. He is a *novus homo*.

The potentiality of a pardon is not fully understood even Cox. by lawyers. In the Federal, State, and English courts there is but one decision. In the case of *The United States v. Wilson* (7 Pet., 150) Chief Justice Marshall, speaking of the pardoning power, said :

"As this power had been exercised from time immemorial by the Executive of that nation, whose language is our language, and to whose judicial institutions ours bear a close resemblance, we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it."

In Sharswood's *Blackstone* (vol. 2, p. 402) it is said :

"The effect of a pardon is to make the offender a new man; to acquit him of all corporal penalties and forfeitures annexed to that offense for which he obtains a pardon; it gives him a new credit and capacity; and the pardon of treason or felony, even after conviction or attainder, will enable a man to have an action of slander for calling him a traitor or felon."

Bacon's *Abridgement* says :

"The stroke being pardoned, the effects of it are consequently pardoned."

And referring to *Cole's* case, in the old and accurate reporter, *Plowden*, (p. 401,) Bacon says also, (pp. 415, 416, notes *a* and *b* :) :

"The pardon removes all punishment and legal disability."

See, too, *Gilbert on Ev.*, 128; *Brown v. Brashaw*, 2 Bulst., 154; *Wicks v. Smallbrooke*, 1 Siderfin, 52.

In *Bishop's Cr. Law* it is said, (sec. 713 :) :

"The effect of a full pardon is to absolve the party from The effect. all the consequences of his crime and of his conviction therefor, direct and collateral; it frees him from the punishment, whether of imprisonment, pecuniary penalty, or whatever else the law has provided."

Pardon.

In the Pennsylvania case of *Cope v. Commonwealth* (28 Penn. State R., 297) the court say :

"We are satisfied, however, that although the remission of the fine imposed would not discharge the offender from all the consequences of his guilt, a full pardon of the offense would."

In the Massachusetts case of *Perkins v. Stevens* (24 Pick., 280) it is said :

"It is only a full pardon of the offense which can wipe away the infamy of the conviction and restore the convict to his civil rights."

In *ex parte Secombe* (19 How., 9) the Supreme Court say, (by Chief Justice Taney :) :

"It rests exclusively with the court to determine who is qualified to become one of its officers as an attorney and counselor, and for what cause he ought to be removed. The power, however, is not an arbitrary and despotic one, to be exercised at the pleasure of the court, or from passion, prejudice, or personal hostility ; but it is the duty of the court to exercise and regulate it by sound and just judicial discretion, whereby the rights and independence of the bar may be as scrupulously guarded and maintained by the court as the rights and dignity of the court itself." Speech of S. S. Cox upon Butler's amnesty bill, *Globe* of 16 Dec., 1870.

The Romans, too, had their amnesty, which they called *abolitio*, and which is thus defined in their law : "*Abolitio est deletio, oblivio, vel extinctio accusationis.*"

In the case of *Garland* (4 Wall., 380) we held that in the eye of the law the effect of a pardon is that the offender is as innocent as if he had never committed the offense ; and in the case of *Armstrong's Foundry* (6 Wall., 769) we held that the general pardon granted to him relieved him from a penalty which he had incurred to the United States. *United States v. Padleford*, 9 How., 542, 543.

What are
the cases
growing
out of the
rebellion ?

418. THE REBELLION. When in *Padleford's Case*, (9 Wall., 542, 543,) a claimant under the captured and abandoned property act, in the court of claims, asked for a restoration of the proceeds of his property, and showed that he had taken the oath prescribed by the proclamation of President Lincoln of 8 Dec., 1863, (*Paschal's Dig.*, art. 7221,) and had since then kept the oath inviolate, and was, by force of the proclamation, pardoned, this court held that, after the pardon thus granted, no offense connected with the rebellion could be imputed to him ; that the law made the proof of pardon a complete substitute for proof that he had given no aid or comfort to the rebellion. In *Klein's Case*, (13 Wall., 128, 143,) an act of Congress (the *Drake act*) designed to deny to the pardon of the President the effect and operation which the court had thus adjudged to it was held to be unconstitutional and void. In *Mrs. Armstrong's Case*, (13 Wall.,

154,) the court held that the proclamation of pardon and amnesty issued by the President on 25 Dec., 1868, entitled her to the proceeds of her captured and abandoned property in the treasury, without proof that she never gave such aid and comfort; that the proclamation granting pardon unconditionally, and without reservation, was a public act of which all courts of the United States were bound to take notice, and to which all courts were bound to give effect. And such was the principle in *Pargoud's Case*, 13 Wall., 156. The pardon of the President, whether granted by special letters or by general proclamation, relieves claimants of the proceeds of captured and abandoned property from the consequences of participation in the rebellion, and from the necessity of establishing their loyalty in order to prosecute their claims. This result follows, whether we regard the pardon as effacing the offense, blotting it out in the language of the cases, as though it had never existed, or regard persons pardoned as necessarily excepted from the general language of the act which requires claimants to make proof of their adhesion during the rebellion to the United States. *Carlisle v. The United States*, 13 Wall., 152. The pardon by the proclamation of 25 Dec. 1863, (*Paschal's Dig.*, art. 7222,) extends to aliens resident in the United States, as well as to citizens. "The rights of sovereignty," says Wildman, in his *Institutes on International Law*, (p. 40,) "extend to all persons and things not privileged that are within the territory. They extend to all strangers therein, not only to those who are naturalized, and to those who are domiciled therein, having taken up their abode with the intention of permanent residence, but also to those whose residence is transitory. All strangers are under the protection of the sovereign while they are within his territories, and owe a temporary allegiance in return for that protection." The same principle more extended. (1 Webster's Works, 2, sec. 4; 6 Webster's Works, 526; East's Crown Law, chap. 10; Foster's Discourse upon High Treason, §2, p. 185.) *Carlisle v. The United States*, 16 Wall., 154, 155. The act of 17 July, 1862, which provided for the confiscation of the property of the rebels, (12 U. S. St. at Large, 820,) authorized the President to extend pardons. This was a suggestion rather than an authority. But on 8 Dec., 1863, (13 U. S. St. at Large, 737,) the President offered a full pardon, &c. But, in his annual message, he said, "the Constitution authorizes the executive to grant or withhold pardon at his own absolute discretion." And this court has said, "the President's power of pardon is not subject to legislation." "Congress can neither limit the effect of his pardon nor exclude from its exercise any class of offenders." (14 Jan., 1867.) Therefore the repeal of the act of 14 Dec., 1863, by the act of 21 Jan., 1867, did not alter the operation of pardons. *The United States v. Klein*, 13 Wall., 141-143.

Rebellion.

Effect of
the pardon.

Drake.

419. The Drake amendment of 1870, which sought to control the judgments of the court in cotton cases, and to deny the constitutional effect to the President's pardon, violated the rights of both the other departments of the Government, and it was unconstitutional. *The United States v. Klein*, 13 Wall., 144-146; *Carroll v. The United States*, 13 Wall., 150, 152.

Where
property
had been
confiscat-
ed.

UPON CONFISCATED PROPERTY. Conceding that amnesty did restore what the United States held when the proclamation was issued, it could not restore what the United States had ceased to hold. It could not give back the property which had been sold, or any interest in it, either in possession or expectancy. (*Semmes v. United States*, U. S. Reps. S. C., 1 Otto, 000.) Besides, the proclamation of amnesty was not made until December 25, 1868. *Wallach v. Van Riewick*, (Oct. T., 1875,) 1 Otto, 000.

"But the opinion which gives to the judges the right to decide what laws are constitutional and what not, not only for themselves in their own sphere of action, but for the legislature and executive also, in their spheres, would make the judiciary a despotic branch." Jefferson's letter to Mr. Adams. See Paschal's letter to President Grant of 4 July, 1870, *ante*, p. 00.

This theory was denied by the managers in Johnson's trial, and it was insisted that after a law has been passed in due form the President has no right to question its constitutionality, and for that reason to refuse to execute it. And that if he be impeached for refusing to execute the law, the President cannot be heard to urge that the law is unconstitutional, nor could Senators on that account acquit him. At the same time it was conceded that the courts might annul a law by declaring it unconstitutional. Manager Boutwell, 70-73.

State his
power as to
treaties
and
appoint-
ments.

² He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

420. "AND HE SHALL NOMINATE, AND BY AND WITH THE ADVICE AND CONSENT OF THE SENATE SHALL APPOINT," &C. The President has only that power of naming and commissioning incumbents. The functions to be performed, the modes and manner of performing them, the duration of the term of tenure, all the duties and liabilities belonging to the office, are created and defined by the legislative power solely. The mode, the agencies, the instrumentalities of carrying into effect the law, are but a part of the law itself. Senator Howard, 3 Trial of the President, 36.

What of appointments?
178, 184.

The commission is not necessarily the appointment, although conclusive evidence of the fact. (United States v. Le Baron, 19 How., 76.) Manager Logan, 2 Ill., 28.

421. "FOR AND DURING THE TIME ESTABLISHED BY LAW." For a list of the officers not enumerated in this section but established by every and what statute giving the dates of acts creating the office, names or titles of the office, for definite terms, definite unless sooner removed, terms indefinite and not expressly during pleasure, with remarks of discontinuances, &c., see 1 Trial of the President, 548-554.

For how long?

For a list of the various officers affected by the tenure of office law, being, in fact, a pretty full list if all the federal officers and their salaries, see Id., 729-736. A removal from office may either be express—that is, by notification by order of the President of the United States that an officer is removed—or implied, by the appointment of another person to the same office. But in either case the removal is not completely effected till notice is actually received by the person removed. Bowerbank v. Morris, 1 Wall. C. C. R., 125, 129.

A nomination, confirmation, commission, delivery of commission, acceptance by the appointee, notice to the officer removed, are all necessary to a complete removal. Bowerbank v. Morris, 1 Wall. C. C. R., 129, 130.

422. "HEADS OF DEPARTMENTS." The removal of heads of departments during the sessions of the Senate was one—Timothy Pickering, Secretary of State, by John Adams, May 13, 1800.

Give list of appointments.

"List of appointments of heads of departments made by the President at any time during the session of the Senate."

Timothy Pickering, Postmaster General, June 1, 1794.

Samuel L. Southard, Acting Secretary of the Treasury, January 26, 1829.

Asbury Dickins, Acting Secretary of the Treasury, March 17, 1832.

John Robb, Acting Secretary of War, June 8, 1832, and July 16, 1832.

McClintock Young, Acting Secretary of the Treasury, June 25, 1834.

Mahlon Dickerson, Acting Secretary of War, January 19, 1835.

C. A. Harris, Acting Secretary of War, April 29, 1836.

Asbury Dickins, Acting Secretary of State, May 19, 1836.

C. A. Harris, Acting Secretary of War, May 27, 1836.

McClintock Young, Acting Secretary of the Treasury, May 14, 1842, and June 30, 1842, and March 1, 1843.

John Nelson, Acting Secretary of State *ad interim*, February 29, 1844.

McClintock Young, Acting Secretary of the Treasury, May 2, 1844.

Nicholas P. Trist, Acting Secretary of State, March 31, 1846.

McClintock Young, Acting Secretary of the Treasury, December 9, 1847.

John Appleton, Acting Secretary of State, April 10, 1848.

Archibald Campbell, Acting Secretary of War, May 26, 1848.

John McGinnis, Acting Secretary of the Treasury, June 20, 1850.

Winfield Scott, Acting Secretary of War *ad interim*, July 23, 1850.

William S. Derrick, Acting Secretary of State, December 23, 1850, and February 20, 1852.

William L. Hodge, Acting Secretary of the Treasury, February 21, 1852.

William Hunter, Acting Secretary of State, March 19, 1852.

William L. Hodge, Acting Secretary of the Treasury, April 26, 1852.

William Hunter, Acting Secretary of State, May 1, 1852.

William L. Hodge, Acting Secretary of the Treasury, May 24, 1852, and June 10, 1852.

William Hunter, Acting Secretary of State, July 6, 1852.

John P. Kennedy, Acting Secretary of War, August 19, 1852.

William L. Hodge, Acting Secretary of the Treasury, August 27, 1852, and December 31, 1852, and January 15, 1853.

William Hunter, Acting Secretary of State, March 3, 1853.

Archibald Campbell, Acting Secretary of War, January 19, 1857.

Samuel Cooper, Acting Secretary of War, March 3, 1857.

Philip Clayton, Acting Secretary of the Treasury, May 30, 1860.

Isaac Toucey, Acting Secretary of the Treasury, December 10, 1860.

Thomas A. Scott, Acting Secretary of War, August 2, 1861.

George Harrington, Acting Secretary of the Treasury, December 18, 1861.

F. W. Seward, Acting Secretary of State, January 4, 1862,

and January 25, 1862, and February 6, 1862, and April 9, 1862.

George Harrington, Acting Secretary of the Treasury, April 11, 1862, and May 5, 1862.

William Hunter, Acting Secretary of State, May 14, 1862.

George Harrington, Acting Secretary of the Treasury, May 19, 1862.

F. W. Seward, Acting Secretary of State, June 11, 1862, and June 30, 1862.

George Harrington, Acting Secretary of the Treasury, January 8, 1863.

F. W. Seward, Acting Secretary of State, December 23, 1863, and April 11, 1864.

George Harrington, Acting Secretary of the Treasury, April 14, 1864, and April 27, 1864, and June 7, 1864, and June 30, 1864.

F. W. Seward, Acting Secretary of State, January 4, 1865, and February 1, 1865.

George Harrington, Acting Secretary of the Treasury, March 4, 1865.

F. W. Seward, Acting Secretary of State, May 15, 1866.

William E. Chandler, Acting Secretary of the Treasury, December 20, 1866.

John T. Hartley, Acting Secretary of the Treasury, September 16, 1867, and November 13, 1867.

F. W. Seward, Acting Secretary of State, March 11, 1868."

1 Trial of the President, 358. And for a more historical account of the persons temporarily appointed to discharge the duties of heads of departments, see same volume, 575-594.

President Johnson, in a letter to Hugh McCullough, Secretary of the Treasury, said that he suspended Secretary Stanton under the act of 2d March, 1867. But in his answer before the Senate he claimed the power independently of the law under the Constitution. Trial of the President, pp. 37-58, 363, 364.

Johnson
and Stanton.

The first eight charges in the articles of impeachment of President Johnson were that the removal of Stanton was intended to be a violation of the tenure of office act, and also a violation of the Constitution of the United States. Curtis' Speech, §377, 378.

Senator Grimes reviewed the debate of 1789, and sustained this power of the President. 2 Trial of the President, 329, 330.

423. RULE AS TO DEBATES. The debates in Congress upon a law should not be taken into consideration in construing that law. The rule is thus stated by Chief Justice Taney:

State the
rule as to
debates.

"In expounding this law, the judgment of *the court cannot in any degree be influenced by the construction placed upon it by individual members of Congress in the debate which took*

Sumner
upon the
interpreta-
tion of
statutes.

place on its passage, nor by the motives or reasons assigned by them for supporting or opposing amendments that were offered. The law that passed is the will of the majority of both houses, and the only mode in which that will is spoken is in the act itself; and we must gather their intention from the language there used, comparing it, when any ambiguity exists, with the laws upon the same subject, and *looking, if necessary, to the public history of the times in which it was passed.* (Aldridge v. Williams, 3 Howard's Rep., 24.) Senator Sumner, Trial of the President, 262. The same construction was stated in the United States v. The Union Pacific Railroad, 1 Otto, 000.

Mr. Grimes quoted the debates on the tenure of office law to show that the Secretary of War was not included in the proviso of section two of the tenure of office law. He also thought that the act of 1795 had not been repealed, and that there was no distinction between an *ad interim* designation during the session and in the recess. That if the power existed, there could be no offense in the removal and designation; if it did not, then the President was entitled to the benefit of doubts and to show that he took the advice of his cabinet. Id., 331-337.

How as to
removals?

424. "THE CONSENT" of the Senate would be necessary to displace as well as to appoint. Federalist, No. 77. And this rule was acted on by President Adams in the removal of Timothy Pickering, Secretary of State, and the appointment of John Marshall, 12 May, 1800. (See the correspondence.) 1 Trial of the President, 362-365; The works of John Adams, by his son, Charles Francis Adams, Little and Brown's edition, 53-55. For the debate in the House during Washington's administration. (1789.) see 2 Marshall's Life of Washington, Philadelphia edition, 162; and in the Senate, 1 Life of Adams, by Charles Francis Adams, 448-550; Defense of the President, by Curtis, vol. I, 389. Chancellor Kent regarded this action of Congress (1812) as practically settling the question in favor of the constitutional power of removal by the President without the advice of the Senate. (1 Kent Com., 310.) And such was the opinion of Chief Justice Marshall. (2 Marshall's Life of Washington, 162.) Senator Fowler, 3 Trial of the President, 199.

It was practically resolved by the Senate in Mr. Duane's case that removals ought to be for cause. Such seems to have been the view of President Jefferson when first installed into office. Manager Logan. 2 Trial of the President, 37-39.

Senator Trumbull believed the tenure of office law to be constitutional. But he insisted that Mr. Stanton, having been appointed by President Lincoln during a previous term, and his appointment never having been renewed, he was neither in the body of the act nor the exception; and, therefore, under the act of 1795, the President had the right to

remove Stanton, and to make the temporary appointment of Thomas. 3 Trial of the President, 325-328.

And upon this law of 1795, (which according to ordinary rules of construction was repealed by the act of 1863,) the impeachment failed.

³ The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

State the power to fill vacancies.

425. "TO FILL UP ALL VACANCIES." The first act of Congress of 1795 gave the President the power, in case of a vacancy in the office of any head of department or other executive office, to authorize any person to perform the duties of such office until a successor be appointed, limiting the time to six months. (1 Stat., 401.) This act was changed, if not repealed, by the act of 20 Feb., 1863, (12 Stat., 656,) which provided that in case of death, resignation, absence from the seat of Government, or sickness, &c., &c., limiting the time of service to six months. (12 Stat., 657.)

Recite the acts for filling vacancies? 319-330.

It was argued by Mr. Curtis that the act of 1863 did not necessarily repeal the act of 1795. (Sedg. on Stat. Law, 126.) 1 Trial of the President, 401, 402.

How far repealed?

The point in the case was, that under the law of 1863 the removal of Stanton by the President did not create a vacancy which authorized the appointment of Thomas *ad interim*; whereas the law of 1795 applied to any vacancy.

What was the point in Stanton's case?

The Constitution only provided for appointments during the recess and during the session, with the advice of the Senate; but necessity prompted the passage of sundry acts to meet sudden and particular emergencies. (1 Stat., 281, 415; 12 Stat., 635.) These laws apply whether these vacancies occur during a recess or during the session. Curtis in Defense, 1 Trial of the President, 403.

The subsequent acts of 1792 and 1795, in providing for vacancies, made no distinction between vacancies during the session and during the recess, and in the numerous acts cited by counsel, providing for the creation and tenure of offices, passed prior to March 2, 1867, no distinction is made between a removal during the session and during the recess. The practice has corresponded with this construction. In two cases the power to remove heads of departments has been exercised; the one by John Adams, in the removal of Timothy Pickens; the other by Andrew Jackson, in the removal of Mr. Duane. The first case occurred during the session, and the latter during the recess. In compliance with this construction, the commissions of heads of departments declare their tenure to be during the pleasure of the President, and the commission under which Mr. Stanton now holds the De-

The acts of 1792 and 1795.

Adams and Jackson.

During
pleasure.

partment of War limits his tenure "during the pleasure of the President of the United States for the time being." This form of commission, used without question for seventy years through memorable political contests, is entirely inconsistent with a construction of the act of 1789 limiting the power of removal to the recess of the Senate.

Removals
and ap-
point-
ments.

The distinction made by the managers between *removals* during the session and during the recess is derived from the distinction made by the Constitution between *appointments* made during the session and during the recess; but this claim is inconsistent with the foundation upon which the tenure of office act rests. Senator Sherman's Opinion, 3 Trial of the President, 8.

What are
the three
theories?

During the debate in 1789 there were three distinct theories held by different persons in the House of Representatives: One that the Constitution lodged the power of removal with the President alone; another that it had lodged it with the President, acting with the advice and consent of the Senate; the third that the Constitution had lodged it nowhere, but had left it to the legislative power, to be acted upon in connection with the prescription of the tenure of office. The last of these theories was at that day held by comparatively few persons. The first two received not only much the greater number of votes, but much the greater weight of names running in the course of that debate; so much so that when this subject came under the consideration of the Supreme Court of the United States, in the case of *ex parte Hennen*, collaterally only, Mr. Justice Thompson, who delivered the opinion of the court, says that it has never been doubted that the Constitution had lodged the power either in the President alone or in the President and Senate. Curtis in Defense of the President, 1 Trial of the President, 391, 395, 396. See Hamilton's views of the appointing power, Federalist, pp. 76, 77.

Where the office was created during a session of Congress, but not filled until after the adjournment, Secretary Guthrie held that, the office not having been filled before the adjournment of the Senate, it must necessarily remain vacant until its next session. 1 Trial of the President, 719. This accords with the view of Judge Story on the Constitution, § 1557, and of Mr. Wirt, 4 Opin., 362. And for distinction between permanent and temporary appointments see *United States v. Kirkpatrick*, 9 Wheat., 720; Benton's *Thirty Years' View*, Chap. 29.

Repeals.

The act of 1795 repealed the act of 1792 as to the cases therein enumerated, but it left the cases of sickness and absence untouched. As to these the power under the act of 1792 was applied until the act of 20 February, 1863. This latter act repeals the whole act of 1792. But the act of 1863 left untouched vacancies by removal and by expiration of a limited tenure of office. The conclusion, therefore, is, that whatever power the President had, by the act of 1795, to appoint any

person *ad interim*, in case of removal, remains unaffected by the act of 1863. Nor did the act of 2 March, 1867, repeal the act of 1795.

What was the saving point in Johnson's case?

My conclusion, therefore, is, that as the President had a legal right to remove Mr. Stanton, notwithstanding the act of March 2, 1867, he had a right to issue the letter of authority to General Thomas to discharge the duties of the Department of War, under and by virtue of the act of 1795. Senator Fessenden, 3 Trial of the President, 23, 24.

The above was really the saving point in Johnson's case—Ed. See Reverdy Johnson's argument, 3 Id., 54, 55; See Senator Fowler's opinion, 201, 202; Trumbull, 325, 326. The act of 1795 was of doubtful constitutionality. But its existence, unrepealed, would relieve the President from any criminal intent. Senator Sherman, 3 Johnson's Trial, 12. It was repealed by the section of the act of 20 Feb., 1863. (12 Stat., 656.) Id., 13. Senator Trumbull took the opposite ground. Id., 321-325. The act of 1792 does little more than provide for cases of disability. All vacancies were provided for by the Constitution; and temporary disabilities and vacancy by *death* were provided for by the law of 1795. What the Constitution had done well the act does over again; what the Constitution had not done at all the act omits to do. Senator Howe, Id., 73. The act of 1863 re-enacted all that was in both the acts of 1792 and 1795, and repealed them both. (Ellis v. Paige, 1 Pick., 44; and other cases of constructive repeals cited.) Senator Howe, 3 Id., 74. And all the acts contemplate temporary appointments not vacancies to be created. Id., 74, 75. The act of 1795 was repealed by construction. (Leighton v. Walker, 9 N. H., 61; Barton v. King, 12 Mass., 563.) 3 Trial of the President, 91.

The conflicting views.

Senator Hendricks argued that the act of 1795 did not repeal the act of 1792; and that neither the act of 1863 nor the tenure of office act of 1867 repealed the act of 1795. 3 Id., 99, 100. And so argued Senator Fowler, 3 Id., 202, 203.

See Buchanan's message in regard to the appointment of Joseph Holt, Secretary of War, January, 1861.

The act of 1863 was repealed by the act of 1795, by necessary implication. Senator Sumner, 3 Trial of the President, 266.

Upon the whole it will be seen that as a judicial precedent the acquittal turned upon the reasoning of Fessenden and Trumbull against the repeal of the act of 1795. They gave to the President the benefit of doubt where the repeal was only constructive.

426. "THAT MAY HAPPEN." Things *happen* by chance, as by death, resignation, absence not by previous contrivance. The President cannot empty in order to fill. He cannot make a vacancy and then say it has happened. Senator Morrill, 3 Trial of the President, 137.

Define happen? 185, 186, 309.

This confers upon the President full power to fill vacancies in the recess of the Senate irrespective of the time when such vacancies first occurred. (12 Op., 32, 449, 455.) And there are no restrictions upon the power of appointment. And he may appoint such as the Senate has failed to confirm. 14 Op., 564.

State the further powers of the President? 178-184.

SEC. 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take care that the Laws be faithfully executed, and shall commission all the Officers of the United States.

427. "THE STATE OF THE UNION." The Union here means the whole of the country, States and Territories—in fact, all the country under the jurisdiction of the United States. And possibly it is always used in the Constitution in this enlarged sense.

How shall he faithfully execute the laws?

428. "HE SHALL TAKE CARE THAT THE LAWS BE FAITHFULLY EXECUTED." Do not let me be misunderstood. I am not intending to advance upon or occupy any extreme ground, because no such extreme ground has been advanced upon or occupied by the President. He is to take care that the laws are faithfully executed. When a law has been passed through the forms of legislation, either with or without his assent, it is his duty to see that that law is faithfully executed so long as nothing is required from him but ministerial action. He is not to erect himself into a judicial court and decide that the law is unconstitutional, and that, therefore, he will not execute it; for, if that were done, manifestly there never could be a judicial decision. He would not only veto a law, but he would refuse all action under the law after it had been passed, and thus prevent any judicial decision from being made. He asserts no such power; has no such idea of his duty. His idea is, that if a law is passed over his veto which he believes to be unconstitutional, and that law affects the interests of third persons, those whose interests are affected must take care of them, vindicate them,

raise questions concerning them, if they should be so advised. Johnson's views.
If such a law affects the general and public interests of the people, they must take care at the polls that it is remedied in a constitutional way.

But when a question arises whether a particular law has cut off a power confided to him by the people, through the Constitution, and he alone can raise that question, and cause a judicial decision to come between the two branches of the Government to say which of them is right, and after due deliberation, with the advice of those who are his proper advisers, he settles down firmly upon the opinion that such is the character of the law, it remains to be decided whether there is any violation of his duty when he takes the needful steps to raise that question and have it peacefully decided. Curtis in the defense of the President, 1 Trial, 387, 396.

429. "HE SHALL TAKE CARE." That is, he shall be diligent, attentive, faithful in the appointment of proper officers, and in seeing that they faithfully discharge their duties. How take care?
Senator Howard, 3 Trial of the President, 35.

To the Chief Executive Magistrate of the Union is confided the solemn duty of seeing the laws faithfully executed. That he may be able to meet this duty with a power equal to its performance he nominates his own subordinates and removes them at pleasure. For the same reason the land and naval forces are under his orders as their commander-in-chief. But his power is to be used only in the manner prescribed by the legislative department. He cannot accomplish a legal purpose by illegal means, or break the laws himself to prevent them from being violated by others. (9. Op. Att'y Gen. 516.) Senator Edmonds, 3 Johnson Trial, 83; Senator Vickers, Id., 117.

This duty to execute the laws no more includes the power to remove an officer than it does to create an office. The President cannot add a soldier to the army, a sailor to the navy, or a messenger to his office, unless that power is conferred upon him by law; yet he cannot execute the laws without soldiers, sailors, and officers. His general power to execute the laws is subordinate to his duty to execute them with the agencies and in the mode and according to the terms of the law. The law prescribes the means and the limit of his duty, and the limitations and restrictions of the law are as binding upon him as the mandatory parts of the law. Senator Sherman, 3 Trial of the President, 4; Senator Howard, Id., 33-35; Howe, Id., 63.

In a letter of Mr. Madison to Edward Coles, of 15 October, 1834, (4 Madison's Writings, 368,) in referring to the question of the right of the Senate to participate in removals, that distinguished statesman writes thus:

"The claim on constitutional ground to a share in the removal as well as appointment of officers is in direct opposition

The power does not include the power to remove.

Madison

Madison.

to the uniform practice of the Government from its commencement. It is clear that the innovation would not only vary essentially the existing balance of power, but expose the Executive, occasionally, to a total inaction, and at all times to delays fatal to the due execution of the laws."

And on the 16th of February, 1835, in a speech in the Senate, Mr. Webster, whilst questioning the correctness of the decision of '89, says:

"I do not mean to deny 'that at the present moment the President may remove these officers at will, because the early decision adopted that construction, and the laws have since uniformly sanctioned it.'" Senator Reverdy Johnson, 3 Trial of the President, 56.

Can the
power of
removal be
deduced
from this
injunction?

The power of removal is inherent in the Executive, and is deducible from the power to see the laws faithfully executed. And the power cannot be taken from the President. Senator Henderson, 3 Id., 295-297. This view was very forcibly denied. Senator Patterson, 309-311. He cited the arguments of Clay and Webster (in 1835) in favor of limiting the power of removal. Id., 311. Of the power of Congress to define the tenure of the offices it establishes and makes them determinable either at the will of the President alone, of the President and Senate together, or at the expiration of a fixed period I have no doubt. Senator Trumbull, 3 Id., 321.

But on the other side Senator Howard said:

Howard.

"It is true that the first Congress in 1789 did, as the President's answer sets up, by the act organizing the Department of State, recognize and admit the power of removal in the President. But it must not be forgotten that this legislative construction of the Constitution was sanctioned by a majority of only 12 in the House, while the Senate was equally divided upon it, the casting vote being given by John Adams, the Vice President. This state of the vote shows plainly that the *opinion* thus expressed by the two houses was but an opinion, and that it was contested and resisted by a very powerful opposition. The dispute has continued from that day, and the ablest intellects of the country have been ranged on the respective sides—Sherman, Alexander Hamilton, Webster, Clay, and others of the highest eminence as jurists against the power; Madison and numerous others of great ability in favor of it. *It has never been a settled question.* Mr. Webster tells us that, on the passage of the act of 1789, it was undoubtedly the great popularity of President Washington and the unlimited confidence the country reposed in him that insured the passage of the bill by moderating the opposition to it; and the history of the times confirms the comment. It was the beginning of the *lis mota*. And so doubtful has the power ever since been considered that there seems to have been no distinct case of removal by the President during the session of the Senate but by making to them a new nomination." 3 Trial of the President, 34, 35.

Washing-
ton.

And while he admitted that the power to appoint carried Joint action. along the power to remove, he insisted that as the appointment required the joint action of the President and the Senate their joint action was necessary to a removal.

Mr. Howe insisted that in the debate of 1789 the majority Debate of 1789. embraced all those who insisted that the President had the power to remove under the Constitution and also those who insisted that Congress might confer the power. *Id.*, 3 Johnson's Trial, 58-60. He showed that Mr. Madison changed his ground on the question of original power. The right to confer the power of removal on Congress was asserted by the act of 15 May, 1820. See his reference to the debate and note upon Calhoun's bill in 1835, *Id.*, 60. And in the act of 1863, to create a national currency, with the appointment of an officer with a term of five years, "unless sooner removed by the President, by and with the advice and consent of the Senate." And again in the act of 1863, in the act for a national currency secured by a pledge of United States bonds. (13 St. 100.) And in the act 30 June, 1867, forbidding the removal of officers except upon the sentence of a court-martial. (Congressional Globe, 1 Sess., 39 Cong., 3254, 3405.) Senator Howe, 3 Johnson's Trial, 61, 62. See the debate closely criticised by Senator Edmonds, 3 Johnson's Trial, 82.

The impeachment trial cannot be said to have settled the precise constitutional limit.

430. THE PRESENT TENURE OF OFFICE LAW. The tenure of office act (note 184, page 179.) has been greatly modified by the act of 5 April, 1869, (16 Stat., p. 7,) and the two have been carried into the Revised Statutes, (sec. 1767 to 1775.) The proviso in section 1 has been repealed: The President must send his nominations within thirty days after the meeting of the Senate. Sections 3 to 7 remain substantially in force. The result is that the President does not remove but suspends from office in the recess, and nominates some other person to fill the vacancy; and if the Senate fail to consent to that nomination, the suspended incumbent is restored, but the person who received the temporary appointment receives the salary, to the exclusion of all claim by the suspended officer. How stands it now? 184.

SEC. 4. The President, Vice-President, and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors. Who may be impeached, and for what?

431. "THE PRESIDENT." In the first place he will be For what may the impeachable by this House for such an act of mal-adminis-

President
be im-
peached?

tration; for I contend that the wanton removal of meritorious officers would subject him to impeachment and removal from his own high trust. (Madison's speech, 1 Annal Cong., 1804-5, p. 517.) As if the President should accept a bribe. (Manager Nicholson on Chase's Trial, 564.) Or refuse to sign every law passed by Congress. (Wickliffe, in Peck's Trial, 309.) Id., 20. Manager Logan, 2 Trial of the President, 119, 120.

Who are
civil offi-
cers?

432. "AND ALL CIVIL OFFICERS OF THE UNITED STATES." "CIVIL OFFICERS." The office of Secretary of War is a civil office. (14 Op., 201.) An investigating committee of the House, on 2 March, 1876, reported resolutions impeaching William W. Belknap of high crimes and misdemeanors. The evidence strongly tended to show the sale of the post-tradership at Fort Sill for money. The committee also reported that Belknap's resignation had been accepted by the President on the morning of that day at 10 a. m. The House, after some discussion as to whether the accused was then a civil officer, unanimously voted the impeachment. Of course the question is one of jurisdiction, which must finally be determined by the Senate. Congressional Record, 3 March, 1876.

Butler's
definition.

433. "ON IMPEACHMENT." We define, therefore, an impeachable high crime or misdemeanor to be one in its nature or consequences subversive of some fundamental or essential principle of government, or highly prejudicial to the public interest, and this may consist of a violation of the Constitution, of law, of an official oath, or of duty, by an act committed or omitted, or, without violating a positive law, by the abuse of discretionary powers from improper motives, or for any improper purpose. Manager Butler adopting Mr. Lawrence's definition, 1 Trial of the President, 88.

Historical
cases.

To support this he relied on Lord Danby's case, 11 St. Trials, 600; Duke of Somerset's case 1 Howell, St. Trials, 521; Duke of Northumberland's case, 1 St. Trials, 765; Christian's note on Blackstone; Earl of Essex and Southampton's case, 1 St. Trials, 1335; Lord Audley's case, 3 St. Trials, 402; Countess of Essex's case, Moore's Reports, 621; The Earl of Portland's case, 3 St. Trials, 288; Lord Melville's case, 29 St. Trials, 1398; Warren Hasting's case; The Trial of Peck, Addison, and Chase. All these and the trial of Anne Bullen (or Boleyn) were cited to show the singularity of the proceedings, and that no challenges could be made.

In all that great trial there is no more accurate and precise learning than is to be found in the brief of authorities upon the law of impeachable crimes and misdemeanors, prepared by Hon. William Lawrence, of Ohio, which was adopted by Mr. Butler, p. 123 to 146.

Misdemeanor and misbehavior in office mean the same thing. (7 Dane's Abridgement, 365.) Lawrence's Brief in 1 Trial of the President, p. 131, note; Curtis' History of the Const., 132; Story's Const., 799, 800; Dunn v. Anderson, 6 Wheat., 204. Misde-
meanors.

In general, those offenses which may be committed equally by a private person as by a public officer are not the subjects of impeachment. (Rawle on Const., 204.) Lawrence's Brief, 1 Trial of the President, 133; And see 1. Kent's Com., 189.

Manager Logan cited the opinion of Earl Grey, that the remedy is commensurate with the necessity or expediency, which no proceedings in a court of law could affect. (Trial of Queen Caroline in 1820, vol. 1, p. 8.) And for offenses not indictable, (Brougham, Id., 22,) "That it was so large and capacious that he could not place bounds either in space or in time." Lord Coke, cited by Brougham in Queen Caroline's Trial, vol. 1, 62, 63; Logan, 2 Johnson's Trial, 20. Four out of five of the articles against Warren Hastings were not indictable. Id.

We must resort to this common law definition. (Wirt in Peck's Trial, 498, 499.) Id. 20. He also quoted Story on the Constitution, §§ 794-798.

434. "FOR HIGH CRIMES AND MISDEMEANORS." And we are not bound to technical definitions of crimes and misdemeanors. A willful violation of law, a gross and palpable breach of moral obligations, tending to unfit an officer for the proper discharge of his office, or to bring the office into public contempt and derision, is, when charged and proved, an impeachable offense. Senator Sherman, 3 Trial of the President, 1. But there must be moral turpitude or willful violation of law. Id.; see 2 Curtis' Hist. of the Constitution, 260. Impeachment is a process provided, not for the punishment of a crime, but for the protection of the State. Howe, 3 Trial of the President, 68. It must be an indictable offense. Senator Reverdy Johnson, 3 Id., 51; Contra; Senator Yates, Id., 104. And for a crime prescribed or adopted by the United States Senator Garrett Davis, 3 Id., 157-159. What are
high
crimes and
misde-
meanors?

But, although there are no common law crimes adopted by the Constitution, yet, in the District of Columbia, where the President resides, the common law is in force, and the common law of crimes is recognized here. For the definition, we must resort to parliamentary law and the instances of impeachment by which it is illustrated. (2 Woodson's Lectures, 601.) Statesmen are here tried before and by statesmen, upon solid principles of morality. (Burke, in the Trial of Warren Hastings, 1 Bond's Speeches, 4; 2 Hallam's Constitution, chap. 12.) Senator Sumner, 250-252. It may be for the violation of a political trust. (Federalist, No. 65; Rawle, Story and Curtis.) Id. And such are the precedents Common
law
crimes.

in the trial of Pickering, Chase, Peck and Humphreys. *Id.* The technical rules and doctrine of variance governing indictments ought not to prevail in these cases. (15 Howell's State Trials, 467; 1, Bond's Trial of Warren Hastings, 10.) The proceedings cannot be tied down to strict rules. (Federalist 65.) *Id.*

ARTICLE III.

SECTION 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Where does the judicial power reside?

How long do the judges hold their offices?

435. "THE JUDICIAL POWER." Jurisdiction is the power to hear and determine a cause. It is *coram judice* whenever a case is presented which brings this power into action. If it be either a complaint or a plea, either at law or in equity, the court has jurisdiction. (The Arredondo Case, 6 Pet., 709.) If the law confers the power to render a judgment or decree, then the court has jurisdiction. (Rhode Island v. Massachusetts, 12 Pet., 718.) *Banton v. Wilson*, 4 Tex., 404. In *Kuhlman v. The Commonwealth*, 5 Binney, 24, it is said: "The distinction is thus taken in *Groenvelt v. Burwell*, 1 Salk., 263; S. C. Carth., 494; S. C., 1 Ld. Raym., 469: Whenever a new jurisdiction is erected by act of parliament, and the court or judge that exercises this jurisdiction acts as a judge or court of record, according to the course of the common law, a writ of error lies on their judgment; but when they act in a summary method, or in a new course different from the common law, a writ of error does not lie, but *certiorari*. (*Broks v. Morgan*, 5 Ired., 485; *Weldz v. Washburn*, 16 Johns., 49; *Savage v. Gulliver*, 4 Mass., 177.) *Timmins v. Lacey*, 30 Tex., 133, 134. The court has no jurisdiction to control the discretion of executive officers. Thus a mandamus will not lie to compel the treasurer to pay money out of the treasury." (*Auditorial Board v. Arles*, 15 Tex., 75; *Kendall v. The United States*, 12 Pet., 609; *The United States v. Guthrie*, 17 How., 303; *Brashear v. Mason*, 6 How., 101; *Decatur v. Paulding*, 14 Pet., 516; *Tapp. on Mand.*, 161, 162, 315.) *Houston Tap and Brazoria Railroad Company v. Randolph*, 24 Tex., 339.

Define power.
195.

Can the courts control executive officers?

The power of the courts to control the executive officers of the government by mandamus or injunction was denied after an exhaustive review of all the previous cases. *Gaines v. Thompson*, 7 Wall., 551, 552; *The Secretary v. McGarrahan*, 9 Wall., 311; *Paschal's Digest of Decisions*, §§ 18131-18137.

Over the executive.

Give a later history of the supreme judges. Note 197.

436. "IN ONE SUPREME COURT." Chief Justice Chase died 7 May, 1873. No appointment was made "to fill up the vacancy during the recess." But at the meeting of Congress, the President nominated the Hon. George Henry Williams, of Oregon, then the attorney general, to the office, but the Senate not consenting his name was withdrawn, and Hon. Caleb Cushing, of Virginia, was nominated, but the Senate not consenting, MORRISON R. WAITE, of Ohio, was nominated, and on the 21 May, 1874, he was confirmed and appointed, but not sworn until 4 March following; so that the office of chief justice was vacant nearly ten months.

Waite.

Hon. Robert Cooper Grier resigned 15 December, 1869, to take effect 1 February thereafter, and died 25 September, 1870. On 20 December, 1870, Hon. Edwin Macy Stanton was nominated, his appointment advised, and he was commissioned the same day. He was born 19 December, 1814, and died 20 December, 1869, never having taken his seat as associate justice.

Stanton.

On 14 March, 1870, the President sent the name of Hon. William Strong to the Senate, which advised and consented to the appointment, and on 14 March, 1870, he was appointed and commissioned. Hon. Samuel Nelson resigned 28 November, 1872, and died 1873. Hon. Ward Hunt, of New York, was nominated, confirmed, and appointed 9 January, 1873.

Strong.

By the act of 10 April, 1869, the Supreme Court was increased to nine judges. On 23 March, 1870, Hon. Joseph P. Bradley, of New Jersey, was nominated, and the Senate having advised and consented, he was appointed on 23 March, 1870.

Bradley.

The new judges were respectively born as follows: Joseph P. Bradley, in 1813; Samuel Strong, 6 May, 1808; Ward Hunt, 14 June, 1810; Morrison R. Waite, 27 November, 1816.

Ages.

Were the provisional courts inferior?

437. "AND IN SUCH INFERIOR COURTS." The provisional court established by proclamation in regard to Louisiana took jurisdiction of an admiralty cause pending in the United States circuit court of Louisiana. There was no doubt of the constitutional power of the President to establish such court. And Congress having, by act, ordered the transfer of all pending causes and judgments in the provisional court to the circuit court, an appeal rightfully lay from such judgment to the circuit court. The Grapeshot, 9 How., 129, 133.

What is the compensation of the judges, and what is the power to

438. "AND SHALL AT STATED TIMES RECEIVE FOR THEIR SERVICES A COMPENSATION, WHICH SHALL NOT BE DIMINISHED DURING THEIR CONTINUANCE IN OFFICE." By the act of 3 March, 1873, the salary of the chief justice and associate justices was increased to ten thousand dollars

per annum each. (Rev. Stats., secs. 673-676.) On 10 March, 1863, the Supreme Court ordered the letter of Chief Justice Taney of 15 February of that year to be recorded in the minutes of the court, as a protest against the collection of three per cent. tax on the salaries of the judges, under the act of Congress. It is urged that it unconstitutionally diminishes the compensation of every judge, and that it is a question that no judge can try judicially. The right to diminish a salary fixed by law, either by taxation or otherwise, is denied. Supreme Court records of that date. This letter and order are also found in Tyler's Life of Taney, 432-435. And the author adds, that in 1872, the then Secretary of the Treasury, Boutwell, had adopted the views contained in the chief justice's letter, and he declined to deduct the internal revenue tax from the salaries of the judges. It therefore resulted that Secretary Chase, who failed to answer Taney's protest, himself, as chief justice, received the benefit of Taney's enlightened opinion. The income tax was refunded.

diminish
it?
Taney.

Boutwell.

SECTION 2. ¹The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers, and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

To what
does the
judicial
power ex-
tend?
Page 194,
notes 199-
210.

439. GENERAL PRINCIPLE. In some cases from their commencement the federal jurisdiction is exclusive; in other cases the Constitution and laws determine at what stage of the procedure such jurisdiction shall attach, and how long and how far concurrent jurisdiction of the State courts shall be permitted. Thus, as to all cases affecting ambassadors, admiralty jurisdiction, and where the United States are parties, the cognizance of the United States courts is exclusive. But as to cases where the parties—citizens or aliens—

State the
general
principles
of original
and appel-
late juris-
diction.

When to
transfer.

give the jurisdiction, the law may provide for the time of election to sue or to transfer the cause. In another class of cases the jurisdiction is appellate; but Congress may provide for the transfer of the cause because the Constitution, law, or treaty is brought in question—that is, the subject-matter may give original or appellate jurisdiction. (*Martin v. Hunter*, 1 Wheat., 334; *The Moses Taylor*, 4 Wall., 429.) *Railway Co. v. Whitton*, 13 Wall., 288. And to these cases it has been recently added.

Gaines.

In cases where the judicial power of the United States can be applied only because they involve controversies between citizens of different States, it rests with Congress to determine at what time the power may be invoked, and upon what conditions; whether originally in the Federal court, or after suit brought in the State court; and, in the latter case, at what stage of the proceedings; whether before issue or trial by removal to a Federal court, or after judgment upon appeal or writ of error. A suit to annul a will as a muniment of title, and to restrain the enforcement of a decree admitting it to probate, is in essential particulars a suit in equity, and if by the law obtaining in a State, customary or statutory, such a suit can be maintained in one of its courts, whatever designation that court may bear, it may be maintained by original process in the circuit court of the United States, if the parties are citizens of different States. *Gaines v. Fuentes*, (October Term, 1875,) 1 Otto, 000.

Annulment
of wills.

What is
judicial
power?

440. "THE JUDICIAL POWER." Neither department of the Government is superior to the other, nor can either rightfully infringe upon the duties of the others; the executive cannot control the judiciary, nor the judiciary the executive. *Houston Tap and Brazoria Railroad v. Randolph*, 24 Tex., 317. The judiciary cannot control the treasurer in relation to his duties. *Id.* And after executive officers have acted upon a subject matter within their jurisdiction their decisions are regarded as judicial, and, as to their conclusiveness, they are judged by the same rules as judgments of courts.

"This proposition (as to the conclusiveness of a judgment) is true in relation to every tribunal acting judicially, whilst acting within the sphere of their jurisdiction, where no appellate tribunal is created; and even when there is such an appellate power, the judgment is conclusive when it only comes collaterally into question, so long as it is unreversed. But directly the reverse of this is true in relation to the judgment of any court acting beyond the pale of its authority. The principle upon this subject is concisely and accurately stated by this court in the case of *Elliott et al. v. Peirsol et al.* (1 Pet., 340,) in these words: 'Where a court has jurisdiction, it has a right to decide every question which occurs in the cause; and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every

other court. But if it act without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void." (Wilcox v. Jackson, 13 Pet., 510, 511.) This was said in reference to the action of the register and receiver of the general land office. Wilcox v. Jackson, 13 Pet., 510. And the principle seems to be applicable to all official acts. See United States v. Jones, 8 Pet., 375.

441. "SHALL EXTEND TO ALL CASES, IN LAW AND EQUITY, ARISING UNDER THE CONSTITUTION, THE LAWS OF THE UNITED STATES, AND TREATIES MADE, OR WHICH SHALL BE MADE UNDER THEIR AUTHORITY." So if a law be in opposition to the Constitution; if both the law and the Constitution apply to a particular case, so that the court must either decide that case conformably to the law disregarding the Constitution, or conformably to the Constitution disregarding the law, the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty. Marbury v. Madison, 1 Cr., 138.

Suppose the law conflicts with the Constitution?
199.

442. "UNDER THEIR AUTHORITY." The same form of expression "subject to their jurisdiction" occurs in the thirteenth amendment. So the plural pronoun, "them," is used in the definition of treason; and "under them," in the eighth inhibition upon Congress. Whether or not this be any argument in favor of the continued individuality, sovereignty, and independence of the States, it is clear that the United States is a collective, multitudinous plural noun, which, as an antecedent, requires a plural pronoun. Some there are who write "*she*," still more "*it*," and had Henry Clay considered them a corporation, he would have employed "*he*." When *Government* or *nation* is used as an equivalent for the United States, of course a singular verb or pronoun would be correct. "THE UNITED STATES" are used but twice as a nominative in the Constitution, and both times the verb is in the future tense. In the tenth and eleventh amendments the United States are used in contradistinction to "the States." And in art. I, sec. 10, clauses 2 and 3, p. 161, the States are prohibited from acting without the consent of Congress.

In what number in grammar is the United States?
Page 271.
Page 211.

443. BY "CASES AT COMMON LAW" are to be understood suits in which legal rights are to be ascertained and determined, in contradistinction to those where equitable rights alone are recognized and equitable remedies are administered. (Parsons v. Bedford, 3 Pet., 447; Robertson v. Campbell, 3 Wheat., 212.) Irvine v. Marshall, 20 How., 565.

What is understood by cases at common law?

444. "TO ALL CASES AFFECTING AMBASSADORS, OTHER PUBLIC MINISTERS, AND CONSULS." Clause 2 says that in these cases and those in which a State shall be a party "the Supreme Court shall have original jurisdiction." But this does not conflict with and render unconstitutional section 9

What is the rule as to ambassadors, &c.?
202.

Jurisdiction. of the judiciary act of 24 September, 1789, giving jurisdiction to the District Court of the United States in civil cases in suits against consuls and vice consuls. (*United States v. Ravara*, 2 Dall., 297.) But in *Marbury v. Madison*, 1 Cr., 137, the principle seemed to be shaken, for it was said that the original jurisdiction was exclusive. And although this opinion was somewhat qualified in *Cohen v. Virginia*, 6 Wheat., 137, it was strongly intimated that the original jurisdiction was exclusive. In *Osborn v. The Bank of the United States*, 9 Wheat., 820, the chief justice distinctly said that the original jurisdiction is exclusive, and Congress cannot confer it upon an inferior tribunal. But in none of these cases was the opinion called for. The point was brought directly before the court in *United States v. Ortega*, 11 Wheat., 467. But the case turned upon the point that a consul is not an ambassador or public minister. In *Davis v. Packard*, 7 Pet., 281, the constitutionality of section 9 of the act of 1789, which gives jurisdiction to the district courts to the exclusion of the State courts, was directly affirmed. And so the elementary writers have generally thought. (Rawle on the Const., 221, 222; Conkling, 160; Sergeant, 17, 18.) The words of the Constitution express nothing exclusive, nor need such exclusion be implied; for the grant of jurisdiction over a certain subject matter to one court does not of itself imply that that jurisdiction is to be exclusive. *Gittings v. Crawford*, Taney's C. C. Dec., 1-10.

What are the privileges of consuls?
202.

445. "CONSULS." A consul is not entitled by the laws of nations to the immunities and privileges of an ambassador or public minister. He is liable to civil suits, like any other individual, in the tribunals of the country in which he resides, and may be punished in its courts for any offense which he commits against its laws. (1 Kent's Comm., 43, 45; Wheat. International Law, 181.) *Gittings v. Crawford*, 10.

Taney's
C. C. Dec.

Define the extent of admiralty and maritime jurisdiction.
203.

446. "TO ALL CASES OF ADMIRALTY OR MARITIME JURISDICTION." The framers used this as a phrase well understood. It referred to a system of law coextensive with and operating uniformly in the whole country. It leaves no power of enlargement or narrowing to the States. (*The St. Lawrence*, 1 Black, 256, 257.) While we may resort to the codes of other countries, the power exists in Congress to change the law. And regulations have been adopted for registry, enrollment, license, &c. Congress creates such property, and may protect the rights and titles of all persons dealing therein. (*White's Bank v. Smith*, 7 Wall., 655, 656; *Aldrich v. Etna Company*, 8 Wall., 491.) The liens and privileges of State laws in favor of material men cannot be recognized as a part of the maritime law of the land. But where the lien has been perfected, the material men may

file a libel against the vessel or its proceeds. (The General Smith, 4 Wheat., 438; *Peyroux v. Howard*, 7 Pet., 324; *The Orleans v. Phœbus*, 11 Id., 175; *The St. Lawrence*, 1 Black, 522.) *The Lottawanna*, 21 Wall., 579.

Privileges or liens created by State law cannot be enforced in admiralty. *The Lottawanna*, 20 Wall., 220.

447. "BETWEEN TWO OR MORE STATES." A question of boundary between States is within the jurisdiction conferred by the Constitution on this court. A question of boundary between States is necessarily a political question to be settled by compact made by the political departments of the Government. But under due form of government a boundary between States may become a judicial question to be decided by this court. (*Rhode Island v. Massachusetts*, 12 Pet., 724; *Missouri v. Iowa*, 7 How., 660; *Florida v. Georgia*, 17 How., 478; *Alabama v. Georgia*, 23 How., 505.) *Virginia v. West Virginia*, 11 Wall., 54, 55. [This case contains a full history of the creation of West Virginia and of its boundaries. It was one of the important results of the war. And *Missouri v. Kentucky*, 11 Wall., 395, is one where jurisdiction was taken of course, and which is full of history, although no constitutional question was settled.]

What is the rule between two or more States?

448. "BETWEEN A STATE AND CITIZENS OF ANOTHER STATE." The first question which naturally presents itself is, whether the State of Florida has such an interest in the subject-matter of the suit, and in the controversy respecting the same, as to give it a standing in court. It is suggested that the trustees of the internal improvement fund are the only parties legally interested, and that they have no right to bring an original bill in this court. To this it may be answered, in the first place, that the State has a direct interest in the subject-matter (the railroad in question) by reason of holding (as it does) the four millions of bonds which are a statutory lien upon the road. In the next place, the interest of the State in the internal improvement fund is sufficiently direct to give it a standing in court whenever the interests of that fund are brought before a court for inquiry. *Florida v. Anderson*, (Oct. T., 1875,) 1 Otto, 000.

What as to controversies between a State and citizens of another State?

205.

A State here means the people, territory, and government. A State, in the ordinary term of the Constitution, is a political community of free citizens occupying a territory of defined boundaries, and organized under a government sanctioned and limited by a written constitution, and established by the consent of the governed. But in order to the exercise by a State of the right to sue in this court there needs to be a State government competent to represent the State in its relations with the national Government, so far, at least, as the institution and prosecution of a suit is concerned. While Texas was controlled by a government hostile to the United

State defined.

When a State may not sue.

States, and in affiliation with a hostile confederation waging war upon the United States, no suit instituted in its name could be maintained in this court. It was necessary that the government and the people of the State should be restored to peaceful relations to the United States, under the Constitution, before such a suit could be prosecuted. *Texas v. White*, 7 Wall., 700; S. C., 25 Tex. Supp., 465. The circuit courts have not, but the Supreme Court has, jurisdiction when the State is plaintiff. *Wisconsin v. Duluth*, 2 Dillon, 406.

What is the right of States to sue?

449. "TO CONTROVERSIES BETWEEN A STATE, OR CITIZENS THEREOF, AND FOREIGN STATES, CITIZENS, OR SUBJECTS." Expositors of the law of nations unanimously declare, as the rule of all the countries belonging to the great Christian republic of Europe and America, that although a foreign government, whether republican or monarchical, cannot be compelled to enter into the courts of any country as defendant, yet such government has full right to appear as plaintiff equally with any private person, and even equally with the local sovereign. The King of Spain's case, Council Reports, 3 Eq., 729; *Hullet v. The King of Spain*, 1 Dow. & Clark, 175; 2 Phillimore's Comm. on Int. Law, §§ 109-113; *Emperor of Brazil v. Robinson*, 5 Dow. Prac. Cases, 522, (Queen's Bench;) *Queen of Portugal v. Grymes*, 7 Cl. & F., 66; *King of Spain v. Machado*, 4 Russ., 225; S. C., 2 Bligh, N. S., 31, (Chancery;) *King of Spain v. Hullett*, 1 Dow. & Clark, 160, (Chancery;) S. C., 1 Clark & Finnely, 348, (House of Lords;) *Rothschild v. Queen of Portugal*, 3 Young & Collier, 594, (Exchequer;) *King of Two Sicilies v. Wilcox*, 1 Simons, N. S., (Chancery;) *Emperor of Austria v. Kossuth*, 3 De Gex, Fisher & Jones, 174, (Chancery;) *King of Greece v. Wright*, 6 Dow. Prac. Cases, 12; *United States v. Prieleau*, 2 Heming & Miller, 559, (Chancery;) *United States v. Wagner*, Council Reports, 2 Ch. Ap., 582, (Chancery.)

What is the rule as to controversies between citizens of different States? What is the rule as to jurisdiction over corporations?
206.

450. "TO CONTROVERSIES BETWEEN CITIZENS OF DIFFERENT STATES." The decisions about corporations being citizens, in note 206, were intended to be limited to the question of citizenship only; and they do not decide the power of a corporation to act in another State. *Earle v. Bank of Augusta*, 13 Pet., 519. Although a corporation is not a citizen within the provisions of the Constitution, yet when rights of action are to be enforced the corporation will be considered a citizen of the State where it was created within this clause. (*Paul v. Virginia*, 8 Wall., 177.) And it is a citizen of that State where it was created, although it may have been incorporated in another. (*The Ohio and Mississippi Railroad Company v. Wheeler*, 1 Black, 268.) *Railway Company v. Whitton*, 13 Wall., 283; *The Railroad Company v. Harris*, 12 Wall., 65. These cases hold that the corporation cannot migrate, but it may exercise the faculties allowed

to it by the laws of other States. For the purposes of federal jurisdiction it is regarded as if it were a citizen of the State where it was created, and no averment or proof as to the citizenship of its members elsewhere will be permitted.

Domicil
of corpora-
tion.

451. ABSOLUTELY CONCURRENT. The jurisdiction of the courts of the United States over controversies between citizens of different States cannot be impaired by the laws of the States which prescribe the modes of redress in their courts or which regulate the distribution of their judicial power. (*Hyde v. Stone*, 20 How., 175; *Snydam v. Broadnax*, 14 Pet., 67; *Union Bank v. Jolly's Administrators*, 18 How., 503.) *Paine v. Hook*, 7 Wall., 429; *Cowles v. Mercer County*, 7 Wall., 121.

Define the
rule as to
concurrent
jurisdic-
tion.

Whenever a general rule as to property or personal rights or injuries to either is established by State legislation, its enforcement by a federal court, in a case between proper parties, is a matter of course, and the jurisdiction of the court in such a case is not subject to State limitation. *Railway Company v. Whitton*, 13 Wall., 286. As the Constitution imposes no limitation upon the class of cases involving controversies between citizens of different States, to which the judicial power of the United States may be extended, Congress may provide for bringing, at the option of either of the parties, all such controversies within the jurisdiction of the Federal judiciary. *Gaines v. Fuentes*, (October Term, 1875,) *Otto*, 000.

206.

If legal remedies are sometimes modified to suit the changes in the laws of the States and the practice of their courts, it is not so with equitable. The equity jurisdiction conferred on the federal courts is the same that the high court of chancery in England possesses, is subject neither to limitation nor restraint by State legislation, and is uniform throughout the different States of the Union. (*Green's Administratrix v. Creighton*, 23 How., 90; *Robinson v. Campbell*, 3 Wheat., 212; *United States v. Howland*, 4 Wheat., 108; *Pratt et al. v. Northam et al.*, 5 Mason, 95.) *Paine v. Hook*, 7 Wall., 429.

Equitable
remedies.

452. TRANSFER OF CAUSES. Out of the "controversies between citizens of different States" has grown the statutes for the transfer of causes when the parties are citizens thus situated. By section 11 of the judiciary act the jurisdiction is given concurrently with the States, and the amount in controversy must exceed \$500. As such concurrent jurisdiction alone would have somewhat impaired the constitutional rights of citizens of the different States, the 12th section for the transfer of causes was enacted. It has been urged that the two sections are identical, and that no cause can be transferred which could not have been originally brought under the 11th section; but Mr. Justice Story, in *Smith v. Rinds*, 2 Sumner, 344, points out the differences between the two sections.

When may
causes be
transferred
to the Fed-
eral courts?

Act of 1789. Section 12 of the judiciary act of 1789 declares that "if a suit be commenced in a State court against a citizen of another State," &c., the cause may be transferred in accordance with the provisions of the statute. (1 Stat., 79; Brightly's Dig., p. 128, sec. 19.)

Of 1866. Section 1 of the act of 27 July, 1866, says: "If any suit," &c., and provides for a severance. (14 Stat., 306; Brightly's Dig., p. 114, sec. 15.)

When may the motion be made.

In the first act the motion to transfer must be made at the time of entering the appearance; in the second it may be made at any time before the trial. Section 1 of the act of 2 March, 1867, returns to the language "a suit," and "any controversy," and it provides for the change on account of apprehended prejudice. And upon complying with the conditions of the act it is made the duty of the State court "to proceed no further in the suit." There is no discretion left to the judge. (14 Stat., 558; Brightly's Dig., p. 116, sec. 17.) These statutes are an indirect mode by which the Federal courts acquire original jurisdiction. And the constitutionality of these several acts cannot be seriously questioned. (Martin v. Hunter, 1 Wheat., 334; The Moses Taylor, 4 Wall., 429.) Railway Company v. Whitton, 13 Wall., 288, 289; Bushnell v. Kennedy, 9 Wall., 391. Until the law of 1867 the plaintiff had to make his election as to the jurisdiction at the time of commencing his suit; but this was a matter of legislative discretion and expediency, and Congress had the power to allow to either party a right to transfer a cause from the State to a Federal court upon such conditions as it prescribed.

The laws constitutional.

The Gaines case.
The reason of the law.

Railway v. Whitton, 13 Wall., 289. As we have had occasion to observe in previous cases, the provision of the Constitution extending the judicial power of the United States to controversies between citizens of different States, had its existence in the impression that State attachments and State prejudices might affect injuriously the regular administration of justice in the State courts. It was originally supposed that adequate protection against such influences was secured by allowing to the plaintiff an election of courts before suit, and when the suit was brought in a State court, a like election to the defendant afterward. (Railway Co. v. Whitton, 13 Wall., 289.) But the experience of parties immediately after the late war, which powerfully excited the people of different States, and in many instances engendered bitter enmities, satisfied Congress that further legislation was required fully to protect litigants against influences of that character. It therefore provided, by the act of March 2, 1867, (14 Stat., 557,) greater facilities for the removal of cases involving controversies between citizens of different States, from a State court to a Federal court, when it appeared that such influences existed. That act declared that where a suit was then pending, or should afterward be brought in any State court, in which there was a controversy between a citizen of the State in which the suit was brought and a citizen of an-

The local prejudices.

other State, and the matter in dispute exceeded the sum of five hundred dollars, exclusive of costs, such citizen of another State, whether plaintiff or defendant, upon making and filing in the State court an affidavit that he had reason to believe, and did believe, that from prejudice or local influence he would not be able to obtain justice in the State court, might at any time before final hearing or trial of the suit, obtain a removal of the case into the circuit court of the United States upon petition for that purpose and the production of sufficient security for subsequent proceedings in the Federal court. This act covered every possible case involving controversies between citizens of the State where the suit was brought and citizens of other States, if the matter in dispute, exclusive of costs, exceeded the sum of five hundred dollars. It mattered not whether the suit was brought in a state court of limited or general jurisdiction. The only test was, did it involve a controversy between citizens of the State and citizens of other States, and did the matter in dispute exceed a specified amount? And a controversy was involved in the sense of the statute whenever any property or claim of the parties, capable of pecuniary estimation, was the subject of the litigation and was presented by the pleadings for judicial determination. *Gaines v. Fuentes*, (October Term, 1875,) 1 Otto, 000.

Jurisdiction.

The scope of the act.

Only test.
454.

Smith v. Rinds, 2 Sumner, 344, only involved the question as to whether one of several defendants could transfer the cause independently of the others. The review of *Strawbridge v. Curtis*, 3 Cranch, 267, was uncalled for, and was only authority by analogy. *Beardsley v. Torrey*, 4 Wash. Circuit Court, 286, is admitted to be correct within the sense of the case, but inaccurate in not admitting a distinction between sections 11 and 12. And finally the whole decision turned upon the citizenship of the grantees.

453. DISCRETION. In *Gordon v. Longest*, 6 Pet., 103, it is said: "It must appear to the satisfaction of the State court that the defendant is an alien or a citizen of some other State than that in which the suit is brought, and that the matter in controversy, exclusive of costs, exceeds five hundred dollars." These facts being established, all action by the State courts afterwards is *coram non judice*; and the overruling of the motion to transfer brought the case within the 25th section of the judiciary act. When Mr. Justice Miller came to treat a case under the act of 1867, his argument certainly led to the conclusion that the only questions for the consideration of the State judge are, 1. The sufficiency of the affidavit. 2. The residence of the parties. 3. The amount in controversy. 4. That the citizenship of the applicant may be acquired at any time before the trial of the cause. *Johnson v. Monell*, Woolworth's C. C. Rep., 393-399. And this is the spirit of the case of *Gaines v. Fuentes*,

Suppose the court will not transfer.

454.
Repeat the three rules.

What are the rule and exceptions as to assigned instruments?

454. SUITS UPON ASSIGNED INSTRUMENTS. Suits upon notes payable to a particular individual or bearer may be maintained by the holder without any allegation of citizenship of the original payee. (*Bullard v. Bell*, 1 Mason, 259; *Bank of Kentucky v. Wistar*, 2 Peters, 321.) So, where the assignment was by will, the restriction in the statute is not applicable to the representative of the decedent. (*Chappedelaine v. Dechenaux*, 4 Cranch, 308.) And the assignee of a chose in action may sue in the circuit court for a specific thing or damages, though the court would have no jurisdiction of the suit if brought by the assignors. (*Deshler v. Dodge*, 16 How., 631.) The restriction applies only to contracts which may be properly said to have contents; not mere naked rights of action founded on some wrongful act or neglect of duty to which the law attaches damages, but rights of action founded on contracts which contain within themselves, some promise or duty to be performed. *Barney v. Globe Bank*, 2 Law Register, new series, 229.

The reason of the rule.

The restriction grew out of the apprehension that bonds and notes, given by citizens of the same State to each other, might be assigned to the citizens of another State, and thus render the maker liable to a suit in the federal court. (*Bank of the United States v. The Planters' Bank of Georgia*, 9 Wheat., 904; *Sere v. Pitot*, 6 Cranch, 332.) But the restriction of section 11, as to assignees, is not found in section 12; nor does the reason for it exist. There can be no fraud upon the jurisdiction; nor is it a hardship upon the defendant, but his privilege, which he cannot afterwards gainsay. (*Sayles v. Northwestern Insurance Company*, 2 Curtis, 212.) *Bushnell v. Kennedy*, 9 Wall., 391-394.

The latest act.

Now, by the act of 1875, promissory notes and other negotiable paper are placed upon the same ground as foreign bills of exchange, and the assignees, being citizens of a different State from the defendant, may sue in the circuit courts without reference to the residence of the assignors or original payees; so, by the same act, if the controversy involve the construction of the Constitution, law, or treaty of the United States, the suit may be brought in the federal courts without reference to the residence of the parties; and in all such cases either party may transfer the cause from the State to the federal court.

As to assignees. *Hill v. Winire*, 1 Biss., 275; *Jenkins v. Greenwald*, 1 Bond, 126; *Chamberlain v. Eckart*, 2 Biss., 126.

455. THE FEDERAL QUESTION. The record must disclose that they are citizens of different States, or else a Federal question must give original jurisdiction. *Christmas v. Russell*, 14 Wall., 69. If there be parties who have not the residence, the decree may be rendered, if it can, without prejudice to them. *Horn v. Lockhart*, 17 Wall., 570. The actual residence of the party without reference to that of his family

controls. *Blair v. Western Female Seminary*, 1 Bond, 578; *Cases. United States v. Thorp*, 2 Bond, 350.

Where the cause had been removed to the Circuit Court under the act of 1833, (the force bill,) Mr. Justice Nelson said: "I agree, that if the petition and affidavit with the certificate of counsel failed to bring the cause within the act of Congress providing for the removal, it would be the duty of the court, on motion, to remand it; and such order has also not unfrequently been entered in cases where it appeared clearly, by the admission of the parties or otherwise, that they were not within the act of removal. But in cases where the proceedings are in conformity with the act, the removal is imperative, both upon the State and the Circuit Court; and if the facts are seriously contested, it must be done in a formal manner, by pleadings and proofs, in the latter court.

What is the rule as to removal when the subject-matter is the ground?

The cause, therefore, in question was properly instituted in the State court, leaving the only question for consideration on this motion as to the legal effect of the removal; and as to that I am of opinion that, inasmuch as the act of Congress has been fully complied with, it is not proper, if it be competent, for this court to determine, upon motion, the disputed jurisdictional facts involving the right of legality of the removal; and that, inasmuch as the question of jurisdiction involving them cannot be raised upon the pleadings, the proper place to hear and determine them is on the trial, where the plaintiffs will be at liberty to take advantage of the objection." *Dennistown v. Draper*, 5 Blatchford, 340.

²In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions and under such Regulations as the Congress shall make.

In what cases does the Supreme Court have original jurisdiction?

456. GENERAL REMARKS. The following is a very short analysis of the distribution of the jurisdiction of the different courts of the United States: The United States is divided into fifty-seven districts, for each of which is a district judge and a clerk for each place of holding court. The District Courts have jurisdiction over all offenses (not capital) against the United States; over piracy, when there is no Circuit Court in the district; of all suits for penalties and forfeitures; of all suits at common law brought by the proper officers; of all suits in equity to enforce the internal revenue tax; of all debts due to or by the United States; of all suits under the postal laws; of all admiralty causes and seizures on

What is the jurisdiction of the District Courts?

Prizes. land and waters; of all prizes; of all suits by the assignee of debentures, &c.; of all suits for damages to person or property arising under the civil rights and other laws; of all suits to recover office, with certain exceptions; of all *quo warrantos*; of all suits against national banking associations; of all suits by aliens for torts only; of all suits against consuls or vice consuls: and said courts are courts of bankruptcy. (Rev. Stat., sec. 563.)

Of the Circuit Courts? The United States is divided into nine circuits, for each of which there is a circuit judge, with the former jurisdiction of the associate justices. The chief justice and associate justices are also respectively assigned to these circuits, and they sit with the circuit or district judges. To the circuit judges is given nineteen divisions of jurisdiction, (Rev. Stat., sec. 21,) much of which is concurrent with the district courts.

By the new act of 1875? By the act of 3 March, 1875, (18 Stat., 170,) jurisdiction is given to circuit courts of all cases where the matter in controversy exceeds five hundred dollars, or arises under the Constitution, laws, or treaties of the United States, and all other jurisdiction defined under this article of the Constitution; and exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except as otherwise provided by law, and concurrent jurisdiction with the district courts, of offenses cognizable therein. There are certain restrictions upon the powers of this court. Promissory notes, negotiable by the law of merchant, are placed upon the same footing as foreign bills of exchange. If any suit arising under the Constitution, laws, or treaties of the United States is brought in the State court, when it might have been brought in the United States circuit court, either party may remove said suit to said court.

Service. This act also provides for service on defendants wherever to be found, or by publication, when the proceeding is strictly *in rem*. It will be seen that this is a very important act, and it confers upon the circuit courts, as original jurisdiction, much of that which could only reach the Supreme Court of the United States through the highest court of the State, under sec. 25 of the judiciary act of 1789, as amended by sec. 5 of the act of 1867 and retained under sec. 709 of the revised statutes. So that it would seem to result that jurisdiction growing out of matters arising under the Constitution, laws, and treaties of the United States is concurrent, in the first instance, in the State and Federal courts, subject to be removed from the former to the latter, without regard to the residences of the parties, and that the same jurisdiction is appellate as heretofore. But the statute is so radical that it is hardly safe to venture an opinion in advance of judicial interpretation.

Exclusive original jurisdiction of the The exclusive original jurisdiction of the Supreme Court of the United States is more clearly defined in secs. 4063-4066 of the revised statutes. To give it appellate jurisdic-

tion (dependent upon the amount in controversy) the matter in the circuit courts must have involved five thousand dollars; one thousand dollars if the appeal be from the District of Columbia, but five thousand dollars if from any of the Territories, except Washington. Supreme Court.

The exclusive jurisdiction of the courts of the United States is defined in sec. 711 of the revised statutes.

Appeals in equity and writs of error in common-law causes must be prosecuted within two years. Time.

A *supersedeas* bond may be approved by the judge of the court which rendered the judgment within sixty days, and by one of the associate justices, it would seem at any time before judgment of the Supreme Court. Supersedeas.

457. "IN CASES AFFECTING AMBASSADORS, &C., AND WHERE A STATE SHALL BE A PARTY." The Supreme Court has original jurisdiction only in the two classes of cases mentioned in this clause. *Ex parte Yerger*, 8 Wall., 95, 96. Exclusive jurisdiction.

458. JURISDICTION. Where the jurisdiction is exclusively appellate its revisory power is to be exerted, not over its own judgments, but over those of inferior jurisdiction. These it has the power to affirm, reverse, and reform, or to remand the cause for a new trial and a more definite decision; but the statute has conferred upon it no authority to revise its own judgments upon the merits or to effect any material modification to any material thing therein determined at a subsequent term. *Chambers v. Hodges*, 3 Tex., 528; *Cameron v. McRoberts*, 3 Wheat., 591; *The Bank of the Commonwealth v. Wistar*, 3 Pet., 431; *Ex parte Sibbald v. The United States*, 3 Pet., 491; *The Palmyra*, 12 Wheat., 10; *Martin v. Hunter*, 7 Wheat., 355, cites *Hudson v. Guestier*, 7 Cranch, 1; *Browder v. McArthur*, 7 Wheat., 58, 59; *The Santa Maria*, 10 Wheat., 443; and, in the House of Lords, *Burnas v. Donegan*, 3 Dow., P. C., 157; and, in New York, *Ex relatione The Attorney General v. The Mayor and Aldermen of New York City*, 25 Wend., 253; and also *Jackson v. Ashton*, 10 Pet., 481; *Ex parte Fontenberry v. Foquer*, 5 Ark., 202; *Rawdon et al. v. Real Estate Bank*, 5 Ark., 573. This limitation upon the authority of the court will not prevent the correction of clerical errors or mistakes, or defects of form, or the addition of such clause as may be necessary to carry out the judgment of the court, or to declare a judgment null and void which was rendered in a case not legally before the court. *Chambers v. Hodges*, 3 Tex., 528. But not for errors of fact or law after the term at which they have been rendered, unless for clerical mistakes. *Cameron v. McRoberts*, 3 Wheat., 591. Or to reinstate a cause dismissed by mistake. *The Palmyra*, 12 Wheat., 10. What is the rule as to revisory power?
Clerical errors.

The doctrine of the want of power after the expiration of After ex-

piration of
the term.

the term was affirmed in *Rich v. Minnesota and Northwestern Railroad Company*, 21 How., 82; *Washington Bridge Company v. Stewart*, 3 How., 413; *Peck v. Sanderson*, 18 How., 42; *Sibbald v. The United States*, 2 How., 455. When an act of Congress which gives appellate jurisdiction in a given class of cases is repealed pending appeals, such appeals must be dismissed, upon the principle that "when an act of the legislature is repealed it must be considered, except as to actions passed and closed, as if it never existed. (*Dwarris on Statutes*, 538; *Norris v. Crocker*, 13 How., 429; *Insurance Company v. Ritchie*, 5 Wall., 541.) *Ex parte McCardle*, 7 Wall., 514.

What is the
limitation
as to the
appellate
power?

459. "IN ALL OTHER CASES BEFORE MENTIONED THE SUPREME COURT SHALL HAVE APPELLATE JURISDICTION, BOTH AS TO LAW AND FACT, WITH SUCH EXCEPTIONS AND UNDER SUCH REGULATIONS AS THE CONGRESS MAY PRESCRIBE." Congress having regulated this jurisdiction in certain classes of cases, this affirmative expression excepts all other cases to which the judicial power of the United States extends than those enumerated. (*Wiscart v. Dauchy*, 3 Dall., 321; *Durosseau v. United States*, 6 Cranch, 307; *The Lucy*, 8 Wall., 307; *Ex parte McCardle*, 6 Wall., 318; S. C., 7 Wall., 506.) *Murdock v. Memphis*, 20 Wall., 620.

What is the
effect of re-
pealing
section 25
of the judi-
ciary act?

460. "JURISDICTION." Section 2 of the amendatory act of 5 February 1867, repealed section 25 of the judiciary act of 1789. What of the old law is omitted is no longer law. (Revised Statutes, sec. —.) Those federal questions (as they are called) are in regard to the validity or construction of the Constitution, treaties, statutes, commissions, or authority of the Federal Government. But in repealing the last clause, which in terms limited the power of the Supreme Court in reversing the judgments of the State courts for errors apparent on the face of the record, and those alone which respected Federal questions, and omitting that clause from the substituted section, it does not follow that it was intended to enact affirmatively the thing which that clause had prohibited. *Murdock v. Memphis*, 20 Wall., 618, 619.

How must
the ques-
tion have
been raised
in the State
Court?

The question must have been raised and decided by the State courts, or its decision must have been necessary to a decree. It must have been against the right claimed under the Constitution, treaties, laws, or authority of the United States. These things appearing, this court has jurisdiction, and must examine whether the right was correctly adjudicated by the State court; and if so, the judgment must be affirmed; and if erroneously decided upon the Federal question, then this court must further inquire whether there is any other matter adjudged by the State court sufficiently broad to sustain its judgment, notwithstanding its error upon the Federal question. If there be, the judgment must

be affirmed, without inquiring into the soundness of the decisions upon other matters and issues. If the question of Federal law is controlling—no other controlling matter has been decided by the State courts—then this court will reverse the judgment and render a judgment or remand, as the circumstances may require. *Murdock v. Memphis*, 20 Wall., 635, 636. New rule.

³The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed. Where are crimes to be tried? Page 209, notes 212-214.

SECTION 3. ¹Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court. What is treason? Pages 211, 212. Notes 215, 216.

²The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

461. "EXCEPT DURING THE LIFE OF THE PERSON ATTAINTED." Under the act of 17 July, 1862, (the confiscation act,) and the explanatory joint resolution of the same date, only the life estate of the person upon whose offense the land had been seized was subject to condemnation and sale. Consequently a decree condemning the fee could have no greater effect than to subject the life estate to sale. The purchaser was bound to know the law. (*Bigelow v. De Forest*, 9 Wall., 339.) The estate of the offending party and no other could be seized. The *res* was seized, not as in admiralty, for its own offense, but for the offense of the owner. Consequently, the condemnation is subject to all part ownerships, and to all mortgages and liens. *Day v. Mico*, 18 Wall., 160-162. What means forfeiture, except during the life of the offender?

The heirs of the party whose property is seized are not estopped by the fact that the offending party was barred from recovering against the judgment of seizure. *Bigelow v. Forest*, 9 Wall., 352. The confiscation cases.

The doctrine of these cases approved. Under the act of

Wallach's
case.
Pike.

Congress the court had no power to order a sale which should confer upon the purchaser rights outlasting the life of F. F. Had it done so it would have transcended its jurisdiction. And although it had jurisdiction over the party and the subject-matter, its judgment as to the excess of power is null. *Ex parte Lange*, 18 Wall., 176, 177.

In *Wallach's Heirs v. Van Riswick*, (October Term, 1875.) 1 Otto, 000, Albert Pike, for the heirs, exhausted the whole learning of the common and civil law upon the subject of attainder and forfeiture for crime. His position, in short, was that, by the forfeiture the Crown took the property by right of reversion, as the lord originally did, upon the failure of the tenant to perform services, or at his death; and it lay in the grace of the Crown to grant the land at the death of the traitor to his heirs; and that when by any statute the forfeiture was not to extend beyond the life of the offender, the law followed the previous custom. No grant to the heirs was necessary, for they took, as heirs, at the offender's death by virtue of the saving. (*Brown v. Waite*, 2 Mod., 180.) So it was insisted that by the act of Congress to punish treason and confiscate the property of rebels, the whole estate of the rebel passed by the confiscation; there was nothing left for the rebel to convey, but at his death the property passed to the heirs as if by descent. To support these and other like general propositions, were cited *Lovel's Case*, Plowden, 477; *Walsingham's Case*, Id., 552, 561; *Brown v. Waite*, 2 Mod., 130; Statute 5th Eliz., chap. 11: 18 Eliz., chap. 1; *Foster's Crown Law*, 222; *Thornby v. Fleetwood*, 1 Comyns, 207; *Strange*, 318; *Lord De la Warre's Case*, 11 Co., 1 b.; *Earl of Derby's Case*, 1 Ld. Raym., 355; *Wheatley v. Thomas*, 1 Levinz, 74; *Sheffield v. Ratcliffe*, Hob., 335 a.; *Burgess v. Wheate*, Eden, 128; 2 Wash. on Real Prop., 685, 688, (391,) *393, *395; *Williams*, *222; *Fearne Conting. Rem.*, 210; *Darbison v. Beaumont*, 1 Peirre William, 229; *Brooking v. White*, 2 W. Blackst., 1010; 2 Washburn, 51; *Chandler Jour. of Parl., Ho. of Comm.*, XVIII, 193, 195, 205; *Hansard's Parl. Hist.* VI, 796; *Aikman's Hist. of Scotland*, V, 571; *Burnet's Hist. of His Own Times*, II, 837, 838; *Maccauley's Hist. of Eng.*, III, 241, 242; *Hansard's Parl. Hist.* XIII, 706 ff, 791 ff, 825, 855; *Dowtie's Case*, 3 Coke, 10; *Page's Case*, 8 Coke, 52; *Pandects XLVIII*, 49, 207, §3, 20, 10; *Marcade' Explic.*, 1, 120-127, 141.

The court
in Wal-
lach's case.

To this argument the court responded, that the act of 1862 is not to be construed exclusively by itself. Contemporaneously with its approval a joint resolution was passed by Congress, and approved, explanatory of some of its provisions, and declaring that "no proceedings under said act should be so construed as to work a forfeiture of the real estate of the offender beyond his natural life." The act and the joint resolution are, doubtless, to be construed as one act, precisely as if the latter had been introduced into the

The joint
resolution.

former as a proviso. It was doubted by some, even in high places, whether Congress had power to enact that any forfeiture of the land of a rebel should extend or operate beyond his life. The doubt was founded on the provision of the Constitution, in section 3d, article 3d, that "no attainder of treason shall work corruption of blood or forfeiture except during the life of the person attainted." It was not doubted that Congress might provide for forfeitures effective during the life of an offender. The doubt related to the possible duration of a forfeiture, not to the thing forfeited or to the extent and efficiency of the forfeiture while it continued. The resolution should be so construed as to leave it in accord with the general and leading purpose of the act of which it is substantially a part, for its object was not to defeat but to qualify.

One act.

The limitation.

The words of the resolution are not exactly those of the constitutional ordinance, but both have the same meaning, and both seek to limit the extent of forfeitures. In England attainders of treason worked corruption of blood and perpetual forfeiture of the estate of the person attainted, to the disinheriting of his heirs, or of those who would otherwise be his heirs. Thus innocent children were made to suffer because of the offense of their ancestor. When the Federal Constitution was framed this was felt to be a great hardship, and even rank injustice. For this reason it was ordained that no attainder of treason should work corruption of blood or forfeiture, except during the life of the person attainted. No one ever doubted it was a provision introduced for the benefit of the children and heirs alone; a declaration that the children should not bear the iniquity of the fathers. Its purpose has never been thought to be a benefit to the traitor, by leaving in him a vested interest in the subject of forfeiture. The statute of 5th Elizabeth, chapter 11, "against the clipping, washing, rounding, and filing of coins," declared those offenses to be treason, and enacted that the offender or offenders should suffer death and lose and forfeit all his or their goods and chattels, and also "lose and forfeit all his and their lands and tenements during his or their natural life or lives only." The statute of 18th Elizabeth, chapter 1, enacted the same provision. Each of these statutes provided that no attainder under it should work corruption of blood or deprive the wife of an offender of her dower. The statute of 7 Anne, ch. 21, is similar. They all provide for a limited forfeiture—limited in duration, not in quantity. And certainly no case has been found in which it has been held that either statute intended to leave in the offender an ulterior estate in fee after a forfeited life estate, or any interest whatever subject to his dispensing power. In Lord Lovel's case, Plowden, 488, it was said by Harper, Justice, "the act (of attainder) is no more than an instrument of conveyance, when by it the possessions of one man are transferred over to another." "The

English analogies.

Statutes.

Precedents.

Forfeiture. act conveys it (the land forfeited) to the King, removes the estate out of Lovel and vests it entirely in the King." In *Burgess v. Wheate*, 1 Eden, 201, the Master of the Rolls said, "the forfeiture operated like a grant to the King. The Crown takes an estate by forfeiture subject to the engagements and incumbrances of the person forfeiting. The Crown holds in this case as a royal trustee, (for a forfeiture itself is sometimes called a royal escheat.) * * * If a forfeiture is regranted by the King the grantee is a tenant in capite, and all mesne tenure is extinct." (See also *Brown v. Waite*, 2 Mod., 133.) In *Bigelow v. Forrest*, 9 Wall., 339, and *Day v. Micou*, 18 Wall., 156, some expressions were used indicating an opinion that what was sold under the confiscation acts was a life estate carved out of a fee. The language was perhaps incautiously used. We certainly did not intend to hold that there was anything left in the person whose estate had been confiscated. In *Lord De La Warre's case*, 11 Coke, 1, *a*, it was resolved by the justices "that there was a difference betwixt disability personal and temporary and a disability absolute and perpetual; as where one is attainted of treason or felony, that is an absolute and perpetual disability, by corruption of blood, for any of his posterity to claim any inheritance in fee simple, either as heir to him or to any ancestor above him; but when one is disabled by Parliament (without any attainder) to claim the dignity for his life, it is a personal disability for his life only, and his heir after his death may claim as heir to him or to any ancestor above him." (See also *Wheatley v. Thomas*, Levinz, 74.) *Wallach v. Van Riswick*, (October Term, 1875,) 1 Otto, 000.)

Former cases explained.

Constitutionality of the law doubted.

To the editor it has always seemed that the attainder of treason which works corruption of blood or forfeiture, and that only during the life of the person attainted, had to follow the conviction of treason as defined in the Constitution; and that the judgment of the forfeiture of property must be based upon the conviction of the party. In other words, such a conviction is a condition precedent. But the court having given effect to the confiscation act, which presented the anomaly of being a proceeding *in rem*, not for any wrong of the property, but the supposed and unascertained treason of the owner, this view need not be argued. The precedents only give effect to the act of Congress, without passing upon its constitutionality. And the act and the precedents only go to illustrate the maxim that amidst arms constitutions and laws are silent; and, indeed, they become so smothered by the conflict that it is very difficult to bring the blind adherents to precedents back to first principles. It is due to the court to say that the unconstitutionality of the act seems never to have been urged before it, or if urged, it was met by the inconsistent theory of "public enemies."

ARTICLE IV.

SECTION 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof.

What credit shall be given to the public acts of other States? What is the power of Congress? Page 213, notes 218-220.

462. "JUDICIAL PROCEEDINGS." Notice to the defendant, actual or constructive, is essential to the jurisdiction of all courts, and the better opinion is, that a judgment rendered without notice may be shown to be void when brought collaterally before the court. *Nations v. Johnson*, 24 How., 203.

What is the necessity of notice?

463. INDIANA DIVORCE CASES. The decree rendered in Indiana, so far as it related to the real property in question, could have no extra-territorial effect; but, if valid, it bound personally those who were parties in the case, and could have been enforced in the *situs rei*, by the proper proceedings conducted there for that purpose. (*Sutphen v. Fowler*, 9 Paige, 280; *Massie v. Watts*, 6 Cr., 148, 158; *Swann v. Fownereau*, 3 Ves., jr., 44; *Portarlington v. Souby*, 3 Mylne & Keene, 104; *Monroe v. Douglass*, 4 Sanf. Ch., 185; *Shattuck v. Cassidy*, 3 Edw. Ch., 152; *Story's Eq.*, §§ 743, 744.) *Cheever v. Wilson*, 9 Wall., 121.

What is the effect of decrees for divorce?

The courts of the United States take judicial notice of the laws and judicial decisions of the several States. (*Pennington v. Gibson*, 16 How., 80.) *Cheever v. Wilson*, 9 Wall., 121.

If a judgment for divorce is conclusive in a State where it is rendered, it is equally conclusive everywhere in the courts of the United States. (2 *Story on the Const.*, § 1313; *Christmas v. Russell*, 5 Wall., 302.) Where the husband in a divorce case had been regularly served or appeared, it is immaterial that they resided in different States. (*Ditson v. Ditson*, 4 Rhode Island, 87; 2 *Bishop on Mar. and Div.*, 475; *Barber v. Barber*, 21 How., 582.) *Cheever v. Wilson*, 9 Wall., 121, 122.

How far is the judgment conclusive?

464. FEDERAL QUESTION. When the highest State court decides against the validity of a State judgment, it necessarily decides against this provision of the Constitution and the act of Congress, and that gives this court jurisdiction under the 25th section of the judiciary act. *Green v. Van Buskirk*, 5 Wall., 312; *S. C.*, 7 Wall., 145.

How is the Federal question involved?

465. GENERAL PRINCIPLE. The rule in *Mills v. Duryee*, 7 Cr., 481, has never been departed from. It was affirmed

Settled rules.

Authori-
ties.

In *Christmas v. Russell*, 5 Wall., 290; and is now reaffirmed. *Green v. Van Buskirk*, 7 Wall., 147, 148. The legal effect must be such as the court where the judgment was rendered would have given. *Id.*

What of
judgments
by attach-
ment?

A judgment by attachment is valid to sell the property on which a lien was acquired by the levy. And if by the law of the State such a sale pass title, the title is good in another State. (*Cochran v. Fitch*, 1 Sanf. Ch., 146; *Kane v. Cook*, 8 Cal., 449.) *Green v. Van Buskirk*, 7 Wall., 149. If the court had jurisdiction the decree of condemnation and sale is conclusive. (*Hall v. Williams*, 6 Pick., 332.) *Green v. Van Buskirk*, 7 Wall., 149.

But a judgment in attachment only binds the property condemned. If there be no personal service or notice, and no appearance, execution cannot be levied on other property not attached, nor can it be the foundation of an action. Same authorities; *Paschal's Dig. of Decisions*, §§ 4094-4100.

What of
judgments
which af-
fect chat-
tels?

466. AS TO CHATTELS. The fiction that the law of domicile draws the defendant's personal property after him wherever situated, yields whenever it is necessary for the purposes of justice that the actual *situs* of the thing shall be examined. (*Story's Confl. of Laws*, §§ 379, 383, 384; *The People v. The Commissioner of Taxes*, 23 N. Y., 225; *Guillander v. Howell*, 35 N. Y., 657.) *Green v. Van Buskirk*, 7 Wall., 149.

The jurisdiction of a foreign court over the person or the subject-matter embraced in the judgment or decree of such court is always open to inquiry, and, in this respect, the court of another State is to be regarded as a foreign court. The record of such a judgment does not estop the parties from demanding such an inquiry. (*Thompson v. Whitman*, 18 Wall., 457.) In *Knowles v. The Gas-Light Company*, 19 Wall., 58, we further held, in line with the decision in *Thompson v. Whitman*, that the record of a judgment showing service of process on the defendant could be contradicted and disproved. *Hall v. Lanning*, (October Term, 1872,) 1 Otto, 000.

How do
domestic
and foreign
judgments
stand?

Domestic judgments (as was shown in *Thompson v. Whitman*) stand on a different footing from foreign judgments. If regular on their face, and if appearance has been duly entered for the defendant by a responsible attorney, though no process has been served and no appearance authorized, they will not necessarily be set aside, but the defendant will sometimes be left to his remedy against the attorney in an action for damages; otherwise the plaintiff might lose his security by the act of an officer of the court. (*Denton v. Noyes*, 6 Johns., 296; *Grazebrook v. McCreddie*, 9 Wend., 437.) But even in this case it is the more usual course to suspend proceedings on the judgment and allow the defendants to plead to the merits and prove any just defense to the action. In any other State, however, except that in which the judgment was rendered, the facts could be shown, notwithstanding the

recitals of the record, and the judgment would be regarded as null and void for want of jurisdiction of the person. *Hall v. Lanning*, (October Term, 1875,) 1 Otto, 000. Nullity.

The validity of a judgment rendered under the New York partnership law, when prosecuted in another State, against one of the defendants who resided in the latter State and was not served with process, though charged as a copartner of a defendant residing in New York who was served, was brought in question in this court in December term, 1850, in *D'Arcy v. Ketchum*, 11 How., 165. This court decided that the act of Congress was intended to prescribe only the effect of judgments where the court by which they were rendered had jurisdiction; and that by international law a judgment rendered in one State, assuming to bind the person of a citizen of another, was void within the foreign State where the defendant had not been served with process or voluntarily made defense, because neither the legislative jurisdiction nor that of the courts of justice had binding force. *Hall v. Lanning*, (October Term, 1875,) 1 Otto, 000. Partners.

467. GENERAL VIEW OF THE PRINCIPLES AS TO GOING BEHIND THE JUDGMENT. Without that provision of the Constitution of the United States which declares that "full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State," and the act of Congress passed to carry it into effect, it is clear that an interstate record would not be conclusive as to the facts necessary to give the justices of Monmouth county jurisdiction, whatever might be its effect in New Jersey. *Thompson v. Whitman*, 18 Wall., 461. In any other state it would be regarded like any foreign judgment; and as to a foreign judgment it is perfectly well settled that the inquiry is always open, whether the court by which it was rendered had jurisdiction of the person or the thing. "Upon principle," says Chief Justice Marshall, "it would seem that the operation of every judgment must depend on the power of the court to render that judgment; or, in other words, on its jurisdiction over the subject matter which it has determined. In some cases that jurisdiction unquestionably depends as well on the state of the thing as on the constitution of the court. If by any means whatever a prize court should be induced to condemn, as prize of war, a vessel which was never captured, it could not be contended that this condemnation operated a change of property. Upon principle, then, it would seem that, to a certain extent, the capacity of the court to act upon the thing condemned, arising from its being within, or without, its jurisdiction, as well as the constitution of the court, may be considered by that tribunal which is to decide on the effect of the sentence." (*Rose v. Himely*, 4 Cranch, 269.) To the same effect see *Story* on the Constitution, chap. 29. (1 Greenl. Ev., § 540.) Thomp-

The root of the matter.

What are the general principles as to going behind the judgment?

Domestic.

son *v. Whitman*, 18 Wall., 461. *Mills v. Duryee*, 7 Cranch, 484, does not change the rule. (Com. on Const., §1313.) "It" (the Constitution) "did not make the judgments of other States domestic judgments to all intents and purposes, but only gave a general validity, faith, and credit to them as evidence. No execution can issue upon such judgments without a new suit in the tribunals of other States. And they enjoy not the right of priority or lien which they have in the State where they are pronounced, but that only which the *lex fori* gives to them by its own laws in their character of foreign judgments." (Story's Conf. of Laws, § 609.) "The doctrine in *Mills v. Duryee* is to be taken with the qualification that in all instances the jurisdiction of the court rendering the judgment may be inquired into, and the plea of *nil debet* will allow the defendant to show that the court had no jurisdiction over his person. It is only when the jurisdiction of the court in another State is not impeached, either as to the subject matter or the person, that the record of the judgment is entitled to full faith and credit. The court must have had jurisdiction not only of the *cause*, but of the *parties*, and in that case the judgment is final and conclusive." The learned commentator adds, however, this qualifying remark: "A special plea in bar of a suit on a judgment in another State, to be valid, must deny, by positive averments, every fact which would go to show that the court in another State had jurisdiction of the person or of the subject matter." (See also 2 Kent's Comm, 95, note, and cases cited; *Thompson v. Whitman*, 18 Wall., 462.)

Mills and
Duryee
qualified.

The con-
tradictory
casse ex-
plained.

In *Hampton v. McConnell*, 3 Wheat., 234, this court reiterated the doctrine of *Mills v. Duryee*, that "the judgment of a State court should have the same credit, validity, and effect in every other court of the United States which it had in the State courts where it was pronounced; and that whatever pleas would be good in a suit therein in such State, and none others, could be pleaded in any court in the United States." But in the subsequent case of *M'Elmoyle v. Cohen*, 13 Pet., 312, the court explained that neither in *Mills v. Duryee* nor in *Hampton v. McConnell* was it intended to exclude pleas of avoidance and satisfaction, such as payment, statute of limitations, &c.; or pleas denying the jurisdiction of the court in which the judgment was given; and quoted, with approbation, the remark of Justice Story, that "the Constitution did not mean to confer a new power of jurisdiction, but simply to regulate the effect of the acknowledged jurisdiction over persons and things within the State.

Who has
the burden
of proof?

The party assailing the judgment should have shown that the counsel who appeared were not employed by the defendant, according to the doctrine held in the cases of *Shumway v. Stillman*, 6 Wend., 453; *Aldrich v. Kinney*, 4 Conn., 380; and *Price v. Ward*, 1 Dutcher, 225. The remark of the court

that the judgment could not be attacked in a collateral proceeding was unnecessary to the decision, and was, in effect, overruled by the subsequent cases of *D'Arcy v. Ketchum*, 11 How., 165, and *Webster v. Reid*, 11 How., 437. *Thompson v. Whitman*, 18 Wall., 464.

Collateral proceedings.

In the subsequent case of *Webster v. Reid*, 11 How., 437, the plaintiff claimed by virtue of a sale made under judgments in behalf of one Johnson and one Brigham against "the owners of half-breed lands lying in Lee county," Iowa Territory, in pursuance of a law of the Territory. The defendant offered to prove that no service had ever been made upon any person in the suits in which the judgments were rendered, and no notice by publication as required by the act. This court held that as there was no service of process the judgments were nullities. Perhaps it appeared on the face of the judgments in that case that no service was made; but the court held that the defendant was entitled to prove that no notice was given, and that none was published.

Where there was no service?

In *Harris v. Hardeman*, 14 How., 334, which was a writ of error to a judgment held void by the court for want of service of process on the defendant, the subject now under consideration was gone over by Mr. Justice Daniel at some length, and several cases in the State courts were cited and approved, which held that a judgment may be attacked in a collateral proceeding by showing that the court had no jurisdiction of the person, or, in proceedings *in rem*, no jurisdiction of the thing. Amongst other cases quoted were those of *Borden v. Fitch*, 15 Johns., 141, and *Starbuck v. Murray*, 5 Wend., 156; and from the latter the following remarks were quoted with apparent approval: "But it is contended that if other matter may be pleaded by the defendant he is estopped from asserting anything against the allegation contained in the record. It imparts perfect verity, it is said, and the parties to it cannot be heard to impeach it. It appears to me that this proposition assumes the very fact to be established which is the only question in issue. For what purpose does the defendant question the jurisdiction of the court? Solely to show that its proceedings and judgments are void, and therefore the supposed record is in truth no record. * * The plaintiffs in effect declare to the defendant—the paper declared on is a record, because it says you appeared, and you appeared because the paper is a record. This is reasoning in a circle."

May such judgments be attacked by collateral proceedings?

In *Christmas v. Russell*, 5 Wall., 290, where the court decided that fraud in obtaining a judgment in another State is a good ground of defense to an action on the judgment, it was distinctly stated in the opinion that such judgments are open to inquiry as to the jurisdiction of the court and notice to the defendant. (P. 305.) And in a number of cases in which was questioned the jurisdiction of a court, whether of the same or another State, over the general

For fraud and want of jurisdiction.

Jurisdiction.

subject-matter in which the particular case adjudicated was embraced, this court has maintained the same general language. Thus, in *Elliott v. Peirsol*, 1 Pet., 328, 340, it was held that the circuit court of the United States for the district of Kentucky might question the jurisdiction of a county court of that State to order a certificate of acknowledgment to be corrected, and for want of such jurisdiction to regard the order as void. Justice Trimble, delivering the opinion of this court in that case, said: "Where a court has jurisdiction it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. But if it act without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void."

The bottom of the principle.

The same views were repeated in *The United States v. Arredondo*, 2 Pet., 279; *Voorhees v. Bank U. S.*, 10 Pet., 475; *Wilcox v. Jackson*, 13 Pet., 511; *Shriver's Lessee v. Lynn*, 2 How., 59, 60; *Hickey's Lessee v. Stewart*, 3 How., 762, and *Williamson v. Berry*, 8 How., 540. In the last case the authorities are reviewed, and the court say: "The jurisdiction of any court exercising authority over a subject may be inquired into in every other court when the proceedings in the former are relied upon and brought before the latter by a party claiming the benefit of such proceedings;" and "the rule prevails, whether the decree or judgment has been given in a court of admiralty, chancery, ecclesiastical court, or court of common law, or whether the point ruled has arisen under the laws of nations, the practice in chancery, or the municipal laws of States." *Thompson v. Whitman*, 18 Wall., 468, 469.

New Jersey.

No courts have more decidedly affirmed the doctrine that want of jurisdiction may be shown by proof to invalidate the judgments of the courts of other States than have the courts of New Jersey. (*Moulin v. Insurance Co.*, 2 Zabriske, 222; 1 Dutcher, 57; *Price v. Ward*, Id., 225; and as lately as November, 1870, in the case of *Mackay v. Gordon*, 34 New Jersey Rep., 286.) *Thompson v. Whitman*, 18 Wall., 470.

"Every independent government," says the chief justice, "is at liberty to prescribe its own methods of judicial process and to declare by what forms parties shall be brought before its tribunals. But in the exercise of this power no government, if it desires extra territorial recognition of its acts, can violate those rights which are universally esteemed fundamental and essential to society. Thus a judgment by the court of a State against a citizen of such State, in his absence, and without any notice, express or implied, would, it is presumed, be regarded in every external jurisdiction as absolutely void and unenforceable. Such would certainly be the case if such judgment was so rendered against the citizen of a foreign State." (*Mackay v. Gordon*, 34 N. J., 286.) *Thompson v. Whitman*, 17 Wall., 470.

SECTION 2. ¹The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

What are the privileges of citizens?
220.

468. "THE CITIZENS OF EACH STATE." Corporations are not citizens within the meaning of this clause. *Paul v. Virginia*, 8 Wall., 187. The cases cited in note 220, § 12, are confined in express terms as to questions of jurisdiction. (*Bank of United States v. Deveraux*, 5 Cr., 61; *Bank of Augusta v. Earle*, 13 Pet., 586.)

How far are corporations citizens?

469. "PRIVILEGES AND IMMUNITIES." Special privileges enjoyed by citizens in their own State (such as the rights of an incorporated bank) are not secured in other States by this provision. *Paul v. Virginia*, 8 Wall., 180.

What are privileges and immunities?

A corporation, being the mere creation of local law, can have no legal existence beyond the limits of the sovereignty where created. It cannot migrate to another State, and can only sue there by local comity. (*Earle v. Augusta*, 13 Pet., 586.) *Paul v. Virginia*, 8 Wall., 181.

All the civil rights and obligations conferred or imposed by the laws of a State upon its own citizens may be enjoyed and must be submitted to by the citizens of other States, whenever the action of a State tribunal is invoked for their adjustment or enforcement. It is not a matter of mere comity among States, but it is a constitutional guaranty. *Ward v. McKenzie*, 33 Tex., 314.

General principle.

The Supreme Court will not define and describe those privileges and immunities in a general classification, but will decide each case as it comes up. *Ward v. Maryland*, 12 Wall., 418; *Conner v. Elliott*, 18 How., 591. And for further citations than in the previous notes, but which lead to the same results, see *Cooley's Const. Lim.*, 15, note 4.

220, 221.

A State cannot impose, for the privilege of doing business within its limits, a heavier tax upon non-residents than is required of residents. *Woodruff v. Purham*, 8 Wall., 139; *Hinson v. Lott*, 8 Wall., 151; *Ward v. Maryland*, 12 Wall., 418.

Taxes.

²A person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall, on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

How as to fugitives from justice?

³No Person held to Service or Labor in one State, under the Laws thereof, escaping into another, shall,

How about fugitives from labor?

Service. in consequence of any Law or Regulation therein, be discharged from such Service or Labor, but shall be delivered up on Claim of the Party to whom such Service or Labor may be due.

How are
new States
admitted,
and with
what re-
strictions?
229.
230.

SECTION 3. ¹New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

Certain
States.
229.
230.

470. "NEW STATES." Iowa, Wisconsin, and Minnesota were formed out of the northwestern territory. For an interesting history and discussion about the rights of the inhabitants of these territories, see Sibley's case, 2 Contested Elections, 102-106.

What is the
power of
Congress
over terri-
tory?
231.
232.

²The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

The dis-
cretion.

471. "TO DISPOSE OF." The disposal must be left to the discretion of Congress. The power over the whole public lands is vested in Congress without limitation. *United States v. Gratiot*, 14 Pet., 525, 538.

What are
the rights
of the in-
habitants?

472. "TERRITORY" as a government. For an interesting history of the subject, see the discussion upon the continued existence of an organized territory after a part of Wisconsin had been admitted as a State. The creation of a State out of a portion of an organized territory does not destroy the organized rights of the inhabitants not embraced in the State. The governor may remove into the remaining territory and order an election for a member of Congress, and the delegate will be entitled to his seat. And it would seem that the territorial delegate may serve after the complete State organization. Sibley's case, (1848.) 3 Contested Elections, 102-108, which cites Fearing's case from Ohio.

What has

473. THE SUBJECT HISTORICALLY CONSIDERED. The

theory upon which the various governments for portions of the territory of the United States have been organized has ever been that of leaving to the inhabitants all the powers of self-government consistent with the supremacy and supervision of national authority, and with certain fundamental principles established by Congress. As early as 1784 an ordinance was adopted by the Congress of the Confederation providing for the division of all the territory, ceded or to be ceded, into States, with boundaries ascertained by the ordinance. These States were severally authorized to adopt for their temporary government the constitution and laws of any one of the States, and provision was made for their ultimate admission by delegates into the Congress of the United States. We thus find the first plan for the establishment of governments in the territories authorized the adoption of State governments from the start, and committed all matters of internal legislation to the discretion of the inhabitants, unrestricted otherwise than by the State constitution originally adopted by them.

been the theory of organization?

Right at the start, if wrong ever since.

This ordinance, applying to all territories ceded or to be ceded, was superseded three years later by the ordinance of 1787, restricted in its application to the territory northwest of the river Ohio.

1787.

It provided for the appointment of the governor and three judges of the court, who were authorized to adopt, for the temporary government of the district, such laws of the original States as might be adapted to its circumstances. But, as soon as the number of adult male inhabitants should amount to five thousand, they were authorized to elect representatives to a house of representatives, who were required to nominate ten persons from whom Congress should select five to constitute a legislative council; and the house and the council thus selected and appointed were henceforth to constitute the legislature of the territory, which was authorized to elect a delegate in Congress, with the right of debating but not of voting. This legislature, subject to the negative of the governor and certain fundamental principles and provisions embodied in articles of compact, was clothed with the full power of legislation for the territory.

State the plan of organization.

The territories south of the Ohio, in 1794, (1 Stat., 123;) of Mississippi, in 1799, (Ibid., 549;) of Indiana, in 1800, (2 Stat., 58;) of Michigan, in 1805, (Ibid., 309;) of Illinois, in 1809, (Ibid., 514,) were organized upon the same plan, except that the prohibition of slavery, embodied in the ordinance of 1789, was not embraced among the fundamental provisions in the organization of the territories south of the Ohio; and the people in the Territories of Michigan, Indiana, and Illinois were authorized to form a legislative assembly as soon as they should see fit, without waiting for a population of five thousand adult males.

Certain States.

Upon the acquisition of the foreign territory of Louisiana, Louisiana.

- 230-232. in 1803, the plan for the organization of the government was somewhat changed. The governor and council of the Territory of Orleans, which afterwards became the State of Louisiana, were appointed by the President, but were invested with full legislative powers, except as specially limited. A district court of the United States, distinct from the courts of the Territory, was instituted. (2 Stat., 283.) The rest of the Territory was called the district of Louisiana, and was placed under the government of the governor and judges of Indiana. (*Ibid.*, 287.)
- Federal jurisdiction. Jurisdiction of cases in which the United States were concerned, subject to appeal to the Supreme Court of the United States, was for the first time expressly given to a territorial court in 1805. (2 Stat., 338.) The Territory of Missouri was organized in 1812, (2 Stat., 743,) and upon the same plan as the territories acquired by cessions of the States. In the act for the government of this Territory, appears for the first time a provision concerning the qualifications of jurors. The sixteenth section of the act provided that all free white male adults, not disqualified by any legal proceeding, should be qualified as grand and petit jurors in the courts of the Territory, and should be selected, until the general assembly should otherwise direct, in such manner as the courts should prescribe.
- Alabama. The Territory of Alabama, in 1817, (3 Stat., 371,) was formed out of the Mississippi territory, and upon the same plan. The superior court of the territory was clothed with the federal jurisdiction given by the act of 1805. The
- Arkansas. Territory of Arkansas was organized in 1819, (3 Stat., 493,) in the southern part of Missouri territory. The powers of the government were distributed as executive, legislative, and judicial, and vested respectively in the governor, general assembly, and the courts. The governor and judges of the superior court were to be appointed by the President, and the governor was to exercise the legislative powers until the organization of the general assembly. The act for the organization of the territorial government of Florida made the same distribution of the powers of the government as was made in the Territory of Arkansas, and contained the same provision in regard to jurors as the act for the territorial government of Missouri.
- Florida.
- Wisconsin. In 1836 the Territory of Wisconsin was organized under an act which seems to have received full consideration, and from which all subsequent acts for the organization of territories have been copied, with few and inconsiderable variations.
- Legislative power. The language of the section conferring the legislative authority in each of these acts is this :
 "The legislative power of said territory shall extend to all rightful subjects of legislation, consistent with the Constitution of the United States and the provisions of this act ; but

no law shall be passed interfering with the primary disposal of the soil. No tax shall be imposed upon the property of the United States, nor shall the lands or other property of non-residents be taxed higher than the lands or other property of residents.” Disposal of the soil. †

As there is no provision relating to the selection of jurors Jurors. in the Constitution or the organic act, it cannot be said that any legislation upon this subject is inconsistent with either. The method of procuring jurors for the trial of cases is therefore a rightful subject of legislation, and the whole matter of selecting, impaneling, and summoning jurors is left to the territorial legislature.

The action of the legislatures of all the territories has been in conformity with this construction. In the laws of every one of them from that organized under the ordinance of 1787 to the Territory of Montana are found acts upon this subject. Historical acts. Wisconsin, organized April 20, 1836, 5 Stat., 10; Iowa, June 12, 1838, 5 Stat., 235; Oregon, August 14, 1848, 9 Stat., 323; Minnesota, March 3, 1849, 9 Stat., 403; New Mexico, September 9, 1850, 9 Stat., 446; Utah, September 9, 1850, 9 Stat., 453; Nebraska, May 30, 1854, 10 Stat., 277; Kansas, May 30, 1853, 10 Stat., 277; Washington, March 2, 1853, 10 Stat., 172; Colorado, February 28, 1861, 12 Stat., 172; Nevada, March 2, 1861, 12 Stat., 209; Dakota, March 2, 1861, 12 Stat., 239; Arizona, February 24, 1863, 12 Stat., 664; Idaho, March 3, 1863, 12 Stat., 808; Montana, May 26, 1864, 13 Stat., 85.

The judges of the supreme court of the territory are appointed by the President under the act of Congress, but this does not make the courts they are authorized to hold courts of the United States. (*The American Insurance Co. v. Canter*, 1 Peters, 546; later case of *Benner v. Porter*, 9 How., 235.) There is nothing in the Constitution which would prevent Congress from conferring the jurisdiction which they exercise, if the judges were elected by the people of the territory and commissioned by the governor. They might be clothed with the same authority to decide all cases arising under the Constitution and laws of the United States, subject to the same revision. Indeed, it can hardly be supposed that the earliest territorial courts did not decide such questions, although there was no express provision to that effect, as we have already seen, until a comparatively recent period. Judges appointed.

There is nothing in this opinion inconsistent with the cases of *Orchard v. Hughes*, 1 Wall., 73, or of *Hunt v. Palao*, 4 How., 589, properly understood. The first of these cases went upon the ground that the chancery jurisdiction conferred upon the courts of the territories by the organic act was beyond the reach of territorial legislation; and the second, in which the territorial court of appeals was called a court of the United States, was only intended to distinguish it from a State court. (*Clinton v. Englebrecht*, 13 Wall., 440-449.) Precedents.

What does the United States guarantee to the States?

SECTION 4. The United States shall guarantee to every State in this Union a republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened,) against domestic Violence.

Define State here.

474. "THE UNITED STATES SHALL GUARANTEE TO EVERY STATE." The term STATE is also used to express the idea of a people or political community as distinguished from the Government. In this sense it is used in this clause. *Texas v. White*, 7 Wall., 700; S. C., 25 Tex. Supp., 595, 596.

What are the elements of a republican form of government?

475. "REPUBLICAN FORM OF GOVERNMENT." Representation is one of the essentials of a republican form of government, and the United States cannot fulfill that obligation without guaranteeing representation in the House. *Flanders and Hahn's Case*, 3 Feb., 1863, Dawes's Rep., 3 Contested Elections, 446.

The means.

In the exercise of the power conferred by the guaranty clause, as in the exercise of every other constitutional power, a discretion in the choice of means is necessarily allowed. It is essential only that the means must be necessary and proper for carrying into execution the power conferred through the restoration of the State to its constitutional relations under a republican form of government, and that no acts be done, and no authority exerted, which is either prohibited or unsanctioned by the Constitution.

Reconstruction.

So long as the war continued, it cannot be denied that the President might institute temporary government within insurgent districts occupied by the national forces, or take provisional measures in any State for the restoration of State government faithful to the Union, employing, however, in such efforts only such means and agents as were authorized by constitutional laws. But the power to carry into effect the clause of guaranty is primarily a legislative power, and resides in Congress, though necessarily limited to cases where the rightful government is subverted by revolutionary violence, or in imminent danger of being overthrown by an opposing government set up by force within the State. *Texas v. White*, 7 Wall., 702; S. C., 25 Tex. Supp., 467.

When may the governor not be heard?

476. "WHEN THE LEGISLATURE CANNOT BE CONVENED." The call of Governor Senter, of Tennessee, was refused, and the matter was referred to the Reconstruction Committee, upon the opinion of Judge Advocate General Holt, that as the Legislature was in session when the call was made the call should have come from that body. Action of the President, 25 March, 1870.

Authority to suppress rebellion is found in the power to suppress insurrection and carry on war; and authority to provide for the restoration of State governments under the Constitution, when subverted and overthrown, is derived from the obligation of the United States to guarantee to every State in the Union a republican form of government. The latter, indeed, in the case of a rebellion, which involves the government of a State, and, for the time, excludes the national authority from its limits, seems to be a necessary complement to the other. *Texas v. White*, 7 Wall., 701; S. C., 25 Tex. Supp., 466, 467.

Where is the power to suppress rebellion found?

ARTICLE V.

The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two-thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by Conventions in three-fourths thereof, as the one or the other mode of Ratification may be proposed by the Congress; provided, that no Amendment, which may be made prior to the Year one thousand eight hundred and eight, shall in any Manner affect the first and fourth Clauses in the ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

How are amendments made?

Slavery.

477. Under this article the XIVth and XVth Amendments of this work have been adopted since the first publication of this work.

Late amendments.

ARTICLE VI.

¹All debts contracted, and engagements entered into, before the adoption of this Constitution, shall be as valid against the United States, under this Constitution, as under the Confederation.

What of prior debts and engagements?

What is the
supreme
law?

²This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Suppose a
law be not
warranted
by the Con-
stitution?

478. "THE CONSTITUTION OF THE UNITED STATES." I will now call attention to certain leading authorities upon the point that a law passed by Congress in violation of the Constitution is totally void, and as to the discretion vested in the President to decide for himself the question of the validity of such a law. I cite first from the Federalist, No. 76:

The Fede-
ralist.

"There is no position which depends on clearer principles than that every act of a delegated authority contrary to the tenor of the commission under which it is exercised is void. No legislative act, therefore, contrary to the Constitution, can be valid." "If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon *the other departments*, it may be answered that this cannot be the natural presumption where it is not to be collected from any particular provisions of the Constitution."

I cite next from No. 31 of the Federalist, in reference to that clause of the Constitution declaring its supremacy and supremacy of the laws. It is said: "It will not, I presume, have escaped observation that it *expressly* confines this supremacy of laws made *pursuant to the Constitution*, which I mention merely as an instance of caution in the convention, since that limitation would have been to be understood though it had not been expressed."

Kent.

Chancellor Kent, in the first volume of his Commentaries, uses this language: "But in this and all other countries, where there is a written constitution designating the powers and duties of the legislative as well as of the *other departments* of the Government, an act of the legislature may be void as being against the Constitution." "It is liable to be constantly swayed by popular prejudice and passion, and it is difficult to keep it from pressing with injurious weight upon the constitutional rights and privileges of *the other departments*."

Hayburn's
case.

In Hayburn's case, 2 Dall., 407, the opinions of the judges of the circuit courts of the United States for the districts of New York, Pennsylvania, and North Carolina upon the constitutionality of the act of March 23, 1792, are reported.

This act purported to confer upon the judges a power which was not judicial. They were of opinion that Congress had no authority to invest them with any power except such as was strictly judicial, and they were not bound to execute the law in their judicial capacity. Judges.

In *Calder v. Bull*, 3 Dall., 398, it is said: "If any act of Congress or of the legislature of a State violates those constitutional provisions, it is unquestionably void." Judicial precedents.

In *Van Horn's Lessees v. Dorrance*, 2 Dall., 308, we find the following: "What are legislatures? Creatures of the Constitution, they owe their existence to the Constitution; they derive their powers from the Constitution; it is their commission; and, therefore, all their acts must be conformable to it, or else they will be void." "Whatever may be the case in other countries, yet in this there can be no doubt that every act of the legislature repugnant to the Constitution is absolutely void." (Stanberry in defense of the President, 2 Johnson's Trial, 375.)

Chief Justice Marshall, delivering the opinion of the court in *Marbury v. Madison*, says that it is a proposition too plain to be contested that the Constitution controls any legislative act repugnant to it, or that the legislature may alter the Constitution by an ordinary act. Between these alternatives there is no middle ground. The Constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act contrary to the Constitution is not law. If the latter part be true, then written constitutions are absurd attempts on the part of the people to limit a power in its nature illimitable." "Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be that an act of the legislature repugnant to the Constitution is void." "Thus, the particular phraseology of the Constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the Constitution is void; and that courts as well as *other departments* are bound by that instrument." Marshall.

In *Dodge v. Woolsey*, 18 How., 347. 348, the court says: "The departments of the Government are legislative, executive, and judicial. They are co-ordinate in degree to the extent of the powers delegated to each of them. Each, in the exercise of its powers, is independent of the other, but all rightfully done by either is binding upon the others. The Constitution is supreme over all of them, because the people who ratified it have made it so; consequently, anything that may be done unauthorized by it is unlawful." Supreme law.

Again, in 22 How., 242, the nullity of any act inconsistent

Constitution.

Discretion
of the President.

with the Constitution is produced by the declaration that the Constitution is the supreme law.

I will now refer to some decisions of the Supreme Court of the United States which relate more particularly to the point that, as an executive officer, the President is vested with a discretion. In *Marbury v. Madison*, 1 Cranch, 380, is the following:

"By the Constitution of the United States the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers to act by his authority and in conformity with his orders. In such cases their acts are his acts, and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control this discretion."

And in *Martin v. Mott*, 12 Wheat., 31, this:

No appeal
from the
President.
165.

"The law does not provide for any appeal from the judgment of the President, or for any right in subordinate officers to review his decision, and, in effect, defeat it. Whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction that the statute constitutes him the sole and exclusive judge of the existence of those facts." (Henry Stanberry's speech in defense of the President, 2 Johnson's Trial, 374-376.)

The court must determine whether the law be consistent with the Constitution. (*Hepburn v. Griswold*, 8 Wall., 614.)

As proposed
to the
convention.

The original form of this section, as offered by Luther Martin, was "that the legislative acts of the United States, made by virtue and in pursuance of the articles of union and all treaties made and ratified under the authority of the United States, shall be the extreme law of the respective States, as far as those acts or treaties shall relate to the said States or their citizens and inhabitants; and that the judiciaries of the several States shall be bound thereby in their decisions, anything in the respective laws of the individual States to the contrary, notwithstanding." 1 Elliott's Debates, 107, 260. It received its present form from the Committee on Style and Revision. 1 The War Between States, (by Alexander H. Stephens,) 46.

Secession
view.

From this fact and others, no better founded, Mr. Stephens revives the old argument that the States, or rather the people of each State, possessed an inherent sovereignty, a portion of which, or rather the exercise thereof, the States, not the people, delegated, but never surrendered, to a common "confederacy," the General Government, which grants it was urged the States could resume in the same form in which

they were granted. Hence it was urged that this clause was not a grant of power, but a limitation. The War between the States, colloquy 1, vol. 1. Grant of power.

But no casuist has yet attempted a clear definition of that indefinable something, "State sovereignty." It is a theory behind the Constitution rather than in it. It presupposes a dissoluble, instead of an indissoluble, agreement. It overlooks the fact that if the Constitution only created a contract, a compact, or a confederacy, it at the same time guaranteed to every State and to every citizen powers coupled with interests, the violent severance of which destroys the harmony of the entire structure. Sovereignty.

479. "TREATIES." Treaties made by Congress, under the Articles of Confederation, had been declared by Congress and recognized by most of the States to be the supreme law of the land. (Federalist, No. 37; *Ware v. Hylton*, 3 Dall., 199.) What are treaties?

The treaties are compacts as to the sovereigns which make them; they are laws to the subjects, without affecting the allegiance of the inhabitants. (4 Elliot's Debates, 279.) The War between the States, colloquy 1, pp. 48, 49.

In 1791 Mr. Madison wrote as follows: "Treaties, as I understand the Constitution, are made supreme over the constitutions and laws of the particular States, and, like a subsequent law of the United States, over pre-existing laws of the United States; provided, however, that the treaty be within the prerogative of making treaties, which no doubt has certain limits." (Writings of Madison, vol. 1, p. 524.) Attorney General Akerman upon the Choctaw Treaty of 1866, December 15, 1870. The same principle was ruled in *The Schooner Peggy*, 1 Cr., 37. And, after reviewing *Foster and Elam v. Neilson*, 2 Pet., 253; *Taylor v. Morton*, 2 Curtis' C. C., 454; 6 Op., 291; 7 Op., 512; *The British Prisoners*, 1 Wood. & Min., 66; 4 Op., 269; 6 Hamilton's Works, 95, Mr. Akerman arrived at the conclusion that when a treaty provided for the issuance of certain United States bonds to the Choctaws, the Secretary of the Treasury has the power to issue such bonds without waiting for an enabling act of Congress. In other words, the treaty becomes the law to the Secretary. The payment will, of course, require an appropriation. 12 Op., 357-360. A treaty may supersede a prior act of Congress, and an act of Congress may supersede a treaty. *The Cherokee Tobacco*, 11 Wall., 621; *Id.*, 12 Op., 358. How do they stand in relation to laws?
178, 199.

In the Debates of the Fortieth and Forty-first Congresses Mr. Lawrence of Ohio and Mr. Butler of Massachusetts held a different view in regard to Indian treaties.

The language used in treaties with the Indians shall never be construed to their prejudice if words be made use of which are susceptible of a more extended meaning than their plain How construed?

Treaties.

import as connected with the tenor of their treaty. (*Worcester v. Georgia*, 6 Pet., 582.) The *Kansas Indians*, 5 Wall., 760, referred to and approved by Attorney General Akerman in his opinion upon the *Choctaw Treaty*, 15 December, 1870.

This clause of the Constitution is retrospective, as to State constitutions, laws, and treaties. All such fall before this Constitution, a law of Congress, or a treaty. *Ware v. Hylton*, 3 Dall., 326, 327. And a treaty may nullify and make void from the beginning as well as repeal. *Id.*, 250, 282. A law does nothing more than express the will of the nation; a treaty does the same. *Id.*, 281.

What oath
are officers
required
to take?
242.

³ The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

Modified
oath.

480. "OATH." The oath required by the act of 1 June, 1789, of State legislators and judicial officers, is as follows: "I, A. B., do solemnly swear that I will support the Constitution of the United States." (*Rev. Stats.*, sec. 1836.) But the test oath is re-enacted by section 1756, with the qualification in favor of those not rendered ineligible by the XIVth Amendment to take the following oath: "I, A. B., do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God." (*Sec. 1757.*)

ARTICLE VII.

How many
were re-
quired to
ratify?
243.

The ratification of the conventions of nine States shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.

Done in Convention, by the unanimous Consent of the States present, the seventeenth Day of September, in the Year of our Lord one thousand seven hundred and Eighty-seven, and of the

Independence of the United States of America
the Twelfth. In Witness whereof, We have
hereunto subscribed our Names.

GEORGE WASHINGTON, *Presid't.*,
And deputy from Virginia.

New Hampshire.

JOHN LANGDON,
NICHOLAS GILMAN.

Massachusetts.

NATHANIEL GORHAM,
RUFUS KING.

New Jersey.

WIL: LIVINGSTON,
DAVID BREARLY,
WM. PATERSON,
JONA: DAYTON.

Pennsylvania.

B. FRANKLIN,
THOMAS MIFFLIN,
ROBERT MORRIS,
GEO: CLYMER,
THO: FITZSIMONS,
JARED INGERSOLL,
JAMES WILSON,
GOUV: MORRIS.

Delaware.

GEO: READ,
GUNNING BEDFORD, JUN'R,
JOHN DICKINSON,
RICHARD BASSETT,
JACO: BROOM.

Connecticut.

WM. SAML. JOHNSON,
ROGER SHERMAN.

New York.

ALEXANDER HAMILTON.

Maryland.

JAMES M'HENRY,
DAN: OF ST. THOS. JENIFER,
DANL. CARROLL.

Virginia.

JOHN BLAIR.
JAMES MADISON, JR.

North Carolina.

WM. BLOUNT,
RICH'D DOBBS SPAIGHT,
HU. WILLIAMSON.

South Carolina.

JOHN RUTLEDGE,
CHARLES COTESWORTH
PINCKNEY,
CHARLES PINCKNEY,
PIERCE BUTLER.

Georgia.

WILLIAM FEW,
ABRAHAM BALDWIN.

The sign-
ers.

Attest: WILLIAM JACKSON, *Secretary.*

ARTICLES

IN ADDITION TO AND AMENDMENT OF

THE CONSTITUTION

OF THE

UNITED STATES OF AMERICA,

Proposed by Congress, and ratified by the Legislatures of the several States, pursuant to the fifth article of the original Constitution.

ARTICLE I.

What is the
restriction
as to liberty
and the
press?
245.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

What are
general
State con-
stitutions?
245.

481. "RELIGION." Article I, sec. 4, of the constitution of Texas of 1845, reads thus: "All men have a natural and inalienable right to worship God according to the dictates of their own consciences; no man shall be compelled to attend, erect, or support any place of worship, or to maintain any ministry against his consent; no human authority ought, in any case whatever, to control or interfere with the rights of conscience in matters of religion; and no preference shall ever be given by law to any religious societies or mode of worship. But it shall be the duty of the legislature to pass such laws as shall be necessary to protect every religious denomination in the peaceable enjoyment of their own mode of public worship." And so reads the constitutions of most of the States. There is nothing in this article, nor in any other, nor in the Constitution of the United States, to prevent the legislature from forbidding the pursuit of worldly business upon Sunday. (*State v. Stubbs*, 20 Mo., 214; *Specht v. The*

Power of
the States.

Commonwealth, 8 Barr, 326; *The Commonwealth v. Wolf*, 3 Serg. & R., 50; *Chamberlain v. Barnesville and Hudson R. R. Co.*, 15 Ohio, 230.) None here shall be compelled to observe the Jewish, Mohammedan, Catholic, or Protestant form of religion, or to embrace any at all. All are free to embrace any religious denomination, civilized or pagan, that his judgment or taste may dictate as the best or preferable for him. *Gabel v. Houston*, 29 Tex., 344, 345.

What is the extent of the privilege?

482. "OR ABRIDGING THE FREEDOM OF SPEECH AND OF THE PRESS." The statutes, 3 Edward I, ch. 34, and 2 Richard II, ch. 1, sec. 5, only punished the utterance of "false news" and "horrible and false lies." The seditious law of 1798 only punished the writing, publishing, or printing false, scandalous, &c., writings against the President or Congress, and allowed the truth to be given in evidence. (1 St., 596.) The common law never punished a verbal slander criminally. In the United States, the people, not the Government, possess the absolute sovereignty. The legislature, no less than the executive, is under limitations of power. Encroachments are regarded as possible from the one as well as from the other. Hence, in the United States, the great and essential rights of the people are secured against legislative as well as executive ambition. They are secured, not by laws paramount to prerogative, but by constitutions paramount to laws. This security of the freedom of the press requires that it should be exempt not only from previous restraint by the executive, as in Great Britain, but from legislative restraint also; and this exemption, to be effectual, must be an exemption not only from the previous inspection of licenses, but from the subsequent penalty of laws. (4 Madison's Works, 542.) Curtis in defense of the President, 1 Trial of the President, 412.

What was the origin of the phrase?
246.

Mr. Madison very ably denied that the freedom of the press meant the common law freedom, but he insisted upon the right of the people to discuss every branch of the public service.

What is the right of discussion? Madison?

1. The Constitution supposes that the President, the Congress, and each of its houses may not discharge their trusts, either from defect of judgment or other causes. Hence they are all made responsible to their constituents at the returning periods of election; and the President, who is singly intrusted with very great powers, is, as a further guard, subjected to an intermediate impeachment.

The Constitution.
247.

2. Should it happen that either of these branches of the Government may not have duly discharged its trust, it is natural and proper that, according to the cause and degree of their faults, they should be brought into contempt or disrepute, and incur the hatred of the people.

Right to expose.

3. Whether it has, in any case, happened that the proceedings of either or all of those branches evince such a violation

Free examination.

Duty. of duty as to justify a contempt, a disrepute, or hatred among the people, can only be determined by a free examination thereof, and a free communication among the people thereon.

Right of discussion. 4. Whenever it may have actually happened that proceedings of this sort are chargeable on all or either of the branches of the Government, it is the duty, as well as right, of intelligent and faithful citizens to discuss and promulge them freely, as well to control them by the censorship of the public opinion as to promote a remedy according to the rules of the Constitution. And it cannot be avoided that those who are to apply the remedy must feel, in some degree, a contempt or hatred against the transgressing party. (4 Madison's Works, 547.) Curtis in defense of the President, 1 Trial of the President, 413.

Freedom and despotism. Unrestrained speech is as fatal to liberty as despotism. "Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press. But if he publish what is improper, mischievous, or illegal, he must take the consequences of his own temerity." (Blackstone, 1 Tucker, App., 297-299; Story's Commentary on the Constitution, §1880.)

And Chancellor Kent instructs us that "it has become a constitutional principle in this country that every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; and that no law can rightfully be passed to restrain or abridge the freedom of the press." (1 Kent's Com., sec. 241.)

Speech not muzzled. Speech is not, therefore, of necessity innocent because it is not muzzled. Senator Howe, 3 Trial of the President, 78. If Congress could make no law to *prevent* the speeches which Andrew Johnson, as a citizen, made, the Senators cannot, each enacting a law for himself in his own bosom, *punish* him for speaking words about which there was no law, for that would be a dangerous system of *ex post facto laws*. Senator Grimes, 3 Trial of the President, 339.

What is the origin of the right peaceably to assemble.

483. "OR ABRIDGING THE RIGHT OF THE PEOPLE PEACEABLY TO ASSEMBLE AND TO PETITION THE GOVERNMENT FOR A REDRESS OF GRIEVANCES." This affirmation of power in Congress does not amount to an affirmative power to punish individuals for a disturbance of assemblies. This power belongs to the States. *The United States v. Cruikshank*, 1 Woods, 327. This right existed long before the adoption of the Constitution of the United States. In fact, it is, and always has been, one of the attributes of citizenship under a free government. It "derives its source," to use the language of Chief Justice Marshall, in *Gibbons v. Ogden*, 9 Wheat., 211, "from those laws whose authority is acknowledged by civilized men throughout the world." It is found wherever civilization exists. It was not, therefore, a right granted to the people by the Constitution. The Government

of the United States when established found it in existence, with the obligation on the part of the States to afford it protection. As no direct power over it was granted to Congress, it remains, according to this ruling, subject to State jurisdiction. Only such existing rights were committed by the people to the protection of Congress as came within the general scope of the authority granted to the National Government.

The first amendment to the Constitution prohibits Congress from abridging this. This, like the other amendments proposed and adopted at the same time, was not intended to limit the powers of the State governments in respect to their own citizens, but to operate upon the National Government alone. (*Barron v. The City of Baltimore*, 7 Pet., 250; *Lessee of Livingston v. Moore*, 7 Pet., 551; *Fox v. Ohio*, 5 How., 434; *Smith v. Maryland*, 18 How., 76; *Withers v. Buckley*, 20 How., 90; *Pervear v. The Commonwealth*, 5 Wall., 479; *Twitchell v. The Commonwealth*, 7 Wall., 321; *Edwards v. Elliott*, 21 Wall., 557.) It is now too late to question the correctness of this construction. As was said by the late Chief Justice, in *Twitchell v. The Commonwealth*, (7 Wall., 325,) "the scope and application of these amendments are no longer subjects of discussion here." They left the authority of the States just where they found it, and added nothing to the already existing powers of the United States.

The particular amendment assumes the existence of the right of the people to assemble for lawful purposes and protects it against encroachment by Congress. The right was not created by the amendment; neither was its continuance guaranteed, except as against congressional interference. For their protection in its enjoyment, therefore, the people must look to the States. There is where the power for that purpose was originally placed, and it has never been surrendered to the United States.

The right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for anything else connected with the powers or the duties of the National Government, is an attribute of national citizenship, and as such, under the protection of, and guaranteed, by the the United States. The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs, and to petition for a redress of grievances. *United States v. Cruikshank*, (October Term, 1875,) 2 Otto, 000.

ARTICLE II.

A well regulated Militia being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

What are the rights of the people to keep and bear arms?

Restricts
the Nation-
al Govern-
ment.
249.

484. "TO KEEP AND BEAR ARMS." This is one of the amendments that has no other effect than to restrict the powers of the National Government, leaving the people to look for their protection against any violation by their fellow-citizens of the rights it recognizes, to what is called in *The City of New York v. Miln*, 11 Pet., 139, the "powers which relate to merely municipal legislation, or what was, perhaps, more properly called internal police," "not surrendered or restrained" by the Constitution of the United States. *United States v. Cruikshank*, (October Term, 1875,) 2 Otto, 000.

ARTICLE III.

What of
quartering
troops?

No soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

ARTICLE IV.

What of the
right of the
people to be
secure
from
search and
arrest?
251-252.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

ARTICLE V.

What are
the inhibi-
tions in
favor of life
and liberty?
Page 258,
notes 252-
259.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

485. "A GRAND JURY." An indictment is good without declaring that the jurors are a "grand jury." It is sufficient to say "jurors of the United States." *United States v. Williams*, 1 Clifford, 5. Indictment. 253.

486. "TWICE IN JEOPARDY." Jeopardy means hazard or danger, and it has reference to trial and verdict; and no one can claim exemption from a second trial unless he has been tried by a lawful jury, upon a good indictment, and acquitted or convicted. (4 Blackst. Comm., 335; 2 Kent's Comm., 13; Story's Const., § 532; 1 Whart. Cr. Law, 573; Vaux's Case, 4 Coke, 44; Hawk. P. C., 515.) The views of Lord Coke, in 1 and 3 Institutes, pp. 100, 227, are to be disregarded, or else understood that the court may discharge the jury without the consent of the defendant, when there is an absolute impossibility to find a legal verdict, such as the death or sickness of one of the jurors; that is, a physical or moral necessity. And of this necessity the court must judge. (*People v. Olcott*, 2 Johns. Cas., 308; *People v. Goodwin*, 18 Johns., 204; *Gillespie v. Davis*, 5 Yerg., 320; *United States v. Perry*, 9 Wheat., 579.) *Moseley v. The State*, 33 Tex., 672-675. Affirmed. *Taylor v. The State*, 35 Tex., 109. Define jeopardy.

No man can be twice lawfully punished for the same offense in the same jurisdiction. In civil cases the maxim is "*nemo debet bis vexari pro una et eodem causa*;" in the criminal law, "*nemo bis punitur pro eodem delicto*." (*Hawk. Pleas of Crown*, 377.) Or "*nemo debet bis puniri pro uno delicto*." (4 Coke R., 43a; 11 Id., 95b; 4 Blackst. Comm., by Sharswood, 315.) And when punishment has been inflicted no appeal lies; and at common law there could not be two trials. After one, *autrefois acquit* or *autrefois convict* was a good defense. In *Crenshaw v. Tennessee*, (1 Mart. & Yerg., 122,) that punishment for a felony not capital was a bar to all other felonies not capital, committed before such conviction, judgment, and execution. And so in Kentucky. (*State v. Cooper*, 5 Litt., 157.) *Ex parte Lange*, 18 Wall., 170. Twice punished for the same offense.

To prevent State trials being oppressive in the hands of a dominant administration the common law, as well as *magna charta*, provided that one acquittal or conviction should satisfy the law, and hence to plead *autrefois acquit* and *autrefois convict*. And with the same design was it introduced into our constitutions. (*Commonwealth v. Olds*, 5 Litt., 137.) So where a party had been convicted of arson, he could not afterwards be tried for the murder of persons burned in the house at the time. (*Cooper v. The State*, 1 Green., 361.) Such second punishment for the same offense is contrary to the nature and genius of our Government. (*Moore v. Illinois*, 14 How., 13.) And the inhibition applies alike to felonies and misdemeanors. (*Bishop's Cr. Law*, §§ 990, 991; *Chit. Cr. Law*, pp. 452-462.) *Ex parte Lange*, 18 Wall., 172, 173. Magna Charta.

What is
guarded
against?

It is the punishment which would follow a second conviction which is guarded against by the Constitution. And the same danger would exist if a party could be twice sentenced and punished upon the same verdict. *Ex parte Lange*, 18 Wall., 173.

Mistrial.

The rule does not mean that if there has been a mistrial, or the verdict has been set aside on the motion of the accused, or upon his writ of error successfully prosecuted, or when the indictment describes an offense unknown to the law, that he cannot be tried again. (*United States v. Perez*, 579; *People v. Casborns*, 13 Johns., 351.) *Ex parte Lange*, 18 Wall., 173, 174.

If the first
judgment
be in ex-
cess of
power?

That the first judgment was in excess of power, and therefore erroneous or even void, does not warrant the second sentence. (*Miller v. Finkle*, 1 Parker's Cr. Rep., 374.) The illustration may be found in *Bigelow v. Forrest*, 9 Wall., 339, and *Day v. Micou*, 18 Wall., 156. *Ex parte Lange*, 18 Wall., 174-177; *Moseley v. The State*, 33 Tex., 672-675. Affirmed. *Taylor v. The State*, 35 Tex., 109.

Where a party was indicted for killing "N. Evans," and upon the trial it appearing that the name of the deceased was Morgan Evans, whereupon, with leave of the court, the district attorney entered a *nolle prosequi*, the principle of the above case applied; and, notwithstanding the doubts of Bishop, (*Bishop's Cr. Law*, 661,) a sound discretion must be left to the court as to the *nolle prosequi*. But the indictment was for distinct offenses, and the "twice in jeopardy" could not apply. *Taylor v. The State*, 35 Tex., 109, 110.

What
means due
process of
law?
257, 258.

487. "SHALL BE DEPRIVED OF LIFE, LIBERTY, OR PROPERTY WITHOUT DUE PROCESS OF LAW." This means judicial process. The President is not empowered to arrest any one charged with an offense against the United States whom he may believe from the evidence before him to be guilty; nor can he authorize any officer, civil or military, to exercise this power. *Ex parte Merriman*, Taney, C. C., Dec., 259. To make imprisonment lawful it must be either by process of law from the courts of judicature, or by warrant from some legal officer having authority to commit to prison. (*Blackst. Comm.*, 137.) *Id.*

To what
does due
process of
law refer?

488. "WITHOUT DUE PROCESS OF LAW." The inhibition to take private property for public use, without just compensation or due process of law, refers only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power. It does not inhibit laws that indirectly work harm and loss to individuals, such as tariffs, embargoes, wars, non-intercourse, and legal tenders. *Legal Tender Cases*, 12 Wall., 551.

Trial by
jury.

The words "DUE COURSE OF LAW OF THE LAND" do not enjoin in all cases a trial by jury as an indispensable

requisite to a judgment. Judgments by default, *in rem*, on publication, in equity, admiralty, military, or ecclesiastical courts, are all rendered without jury trial, and are not in contravention of this inhibition. (*State v. Allen*, 2 McCord, 55; *Cox v. Cox*, Peck, 448; *Baker v. Webb*, 1 Hayw., 49.) And judgments on official bonds. (*Bonne v. Massey*, 3 Stew., 227.) *Janes v. Reynolds*, 2 Tex., 252, 253.)

Judgment
by default.

Citizens could only be deprived of their property by the due course of law. Hence Congress alone could determine how and in what manner slavery should be terminated. (Chief Justice Morrill.) The Emancipation Cases, 31 Tex., 519, 520. And to deprive the citizen of the obligation of his contract given for slaves would be to deprive him of his property without the due process of law. *Osborn v. Nicholson*, 13 Wall., 662.

Slavery.

These decisions are generally made upon similar provisions in the State constitutions. This provision of the Constitution of the United States applies only to the General Government, and not to the States. *Withers v. Buckley*, 20 How., 84. But these guarantees are in all the State constitutions, go back of them, are parts of the whole system, and are universal American law. (*Sinnicksen v. Johnson*, 2 Harr. N. J., 129; *Gardner v. Newbergh*, 2 Johns. Ch., 162.) *Pumpelly v. Green Bay Company*, 13 Wall., 167; See *Paschal's Digest of Decisions*, §§ 996-998.

Does the
rule apply
only to the
general
government?

489. "NOR SHALL PRIVATE PROPERTY BE TAKEN FOR PUBLIC USE WITHOUT JUST COMPENSATION." Public use does not require that the property taken shall be actually *used*. It may be *disused*, *removed*, or *destroyed*, and destruction of private property may be the best public use it can be put to. Suppose a bridge owned by a private corporation to be so located as to endanger our forts upon the banks of a river: to demolish that bridge for military purposes would be to appropriate it to public use. (*Whiting Book*, p. ; Senate Report No. 412, 42 Cong., 3 Sess., p. 3.)

Define the
rule as to
private
property
taken for
public use.

It may safely be assumed as the settled and fundamental law of Christian and civilized States that governments are bound to make just indemnity to the citizen or subject whenever private property is taken for the public *good*, *convenience*, or *safety*. (*Grant v. United States*, 1 N. & H. Ct. of Claims, 48.) *Best's Case*, Senate Report No. 412, 42 Cong., 3 Sess., p. 3.

There are, without doubt, occasions in which private property may occasionally be taken possession of or destroyed to prevent it from falling into the hands of the public enemy; and also where a military officer charged with a particular duty may impress private property into the public service or take it for public use. Unquestionably, in such cases, the Government is bound to make full compensation to the owner.

Destruction
of
property.

The State
must pay.

If, as the above authorities declare, the State must pay for the property of a citizen destroyed to prevent *it* from falling into the hands of an enemy, *a fortiori* should the State pay for property destroyed to prevent a *garrison* from falling into the hands of an enemy.

Eminent
domain.

Justice Randolph, in the case of *The American Print Works v. Lawrence*, 1 Zabriski, 248, says that in "cases where the State, by virtue of its right of eminent domain, reserves the property of a citizen and appropriates it to the use of the public; or in prosecuting some great public work, such as a canal or railroad, even in its sovereign capacity, or through the power delegated to an incorporated company, finds it necessary not merely to take the soil and property of the citizen, but to destroy his mill seat, divert his water-course, or commit other irreparable damage to private rights in order to effect the great object in view, in such case not only must private rights yield to the interest and wishes of the State, but it is a positive evil suffered by an individual for the supposed gain of the whole community, at the will of that community, and upon every principle of justice the public should make compensation." *Id.* This is a general principle. *Mitchell v. Harmony*, 13 How., 115, 134; *S. C.*, 1 Blatch., 549; *American Print Works v. Lawrence*, 3 Zab., 590; *Vattel*, 403; *Grotius*, b. 2, ch. 14, sec. 7; *Id.*, b. 3, ch. 20, sec. 7; *Russell v. Mayor, &c.*, 2 Denio, 461; 12 *Mouses' Cases*, 12, Coke, 63; *Grant v. The United States*, 1 N. & H. Ct. of Claims, 45-50.

But the danger must be immediate and impending, or the necessity urgent for the public service, such as will not admit of delay. *Id.*

ARTICLE VI.

State the
rights of
the accus-
ed in crimi-
nal prose-
cutions.
Page 263.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have Compulsory process for obtaining Witnesses in his favour, and to have the Assistance of Counsel for his defense.

For what
was the
Constitu-
tion con-

490. "IN CRIMINAL PROSECUTIONS," &c. The Constitution was ordained and established by the people of the United States for themselves, for their own government,

and not for the government of the individual States. (*Barron v. Baltimore*, 7 Pet., 243.) *Twitchell v. The Commonwealth*, 7 Wall., 326.

The powers the people conferred on this government were to be exercised by itself; and the limitations on power, if expressed in general terms, are not naturally and, we think, necessarily applicable to the government created by the instrument. They are limitations of power granted in the instrument itself, not of distinct governments framed by different States and for different purposes. And hence the amendments do not apply to the States. (*Barron v. Baltimore*, 7 Pet., 243; *Fox v. Ohio*, 5 How., 434; *Smith v. Maryland*, 18 How., 76; *Withers v. Buckley*, 20 How., 90.) *Twitchell v. The United States*, 7 Wall., 324, 325.

The chief justice said that the case was settled in the court, but intimated that were the question new the construction might be different.

This and the previous amendment are against the power of the President to exercise any power over "life, liberty, or property" of a private citizen, except to see that the laws be faithfully executed through the judicial department. *Ex parte Merriman*, Taney's C. C. R., 259, 260.

491. "AND TO BE INFORMED OF THE NATURE AND CAUSE OF THE ACCUSATION." This applies to cases in the courts of the United States, and not to State courts. *Twitchell v. The Commonwealth*, 7 Wall., 326. In the *United States v. Mills*, 7 Pet., 142, this was construed to mean that the indictment must set forth the offense "with clearness and all necessary certainty, to apprise the accused of the crime with which he stands charged;" and in *United States v. Cook*, 17 Wall., 174, that "every ingredient of which the offense is composed must be accurately and clearly alleged." It is an elementary principle of criminal pleading that where the definition of an offense, whether it be at common law or by statute, "includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition, but it must state the species—it must descend to particulars." (1 Arch. Cr. Pr. and Plead., 291.) The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent, and these must be set forth in the indictment, with reasonable particularity of time, place, and circumstances. (*State v. Parker*, 43 N. H., 83; *State v. Keach*, 40 Vt., 118; *Alderman v. The People*, 4 Mich., 414; *State v. Roberts*, 34 Me., 32.) *United States v. Cruikshank*, (October Term, 1875,) 2 Otto, 000

stituted?

Who are to exercise the powers of the Government?
260.

Power denied to the President.

To what confined?
253.

Construction.

Indictment.

Generic terms.

ARTICLE VII.

Right of
trial by
jury, and
on review
of facts.

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

The his-
tory.
263.

492. "IN SUITS AT COMMON LAW, WHERE THE VALUE IN CONTROVERSY SHALL EXCEED TWENTY DOLLARS, THE RIGHT OF TRIAL BY JURY SHALL BE PRESERVED." This should be read as a substantial and independent clause. And it is a prohibition to the courts of the United States to re-examine any facts tried by a jury in any other manner. (*Parsons v. Bedford*, 3 Pet., 447, 448.) The history of the amendment confirms this view. (*Debates in Congress*, by Gales & Seaton, vol. 1, pp. 452, 458, 784.) The *Justices v. Murray*, 9 Wall., 277.

Facts re-
viewed.
264.

493. "AND NO FACT TRIED BY A JURY SHALL BE OTHERWISE RE-EXAMINED IN ANY COURT OF THE UNITED STATES, THAN ACCORDING TO THE COMMON LAW." The only modes known to the common law to re-examine such facts was the granting a new trial by the court where the issue was tried, or the award of a *venire facias de novo* by the appellate court, for some error of law that had intervened in the proceedings. (*Parsons v. Bedford*, 3 Pet., 448.) The *Justices v. Murray*, 9 Wall., 277, 278.

Limita-
tions.

These ten amendments are limitations upon the powers of the Federal Government, and not upon the States. (*Barron v. The Mayor and City of Baltimore*, 7 Pet., 243; *Lessee of Livingstone v. Moore*, 7 Pet., 550; *Twitchell v. Commonwealth*, 7 Wall., 321.) The *Justices v. Murray*, 9 Wall., 278. But this amendment had reference to the revision of the judgments of the State courts as well as the inferior Federal courts. (*Waterbee v. Johnson*, 14 Mass., 412; *Pattie v. Murray*, 46 Barb., 331. So much of the act of 1863 as provides for the removal of a judgment in a State court to this court for retrial on the facts and law is void. The *Justices v. Murray*, 9 Wall., 280-282.

ARTICLE VIII.

Excessive
bail.
266, 267.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

ARTICLE IX.

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

What of the enumeration of rights?
268.

ARTICLE X.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

What of the reserved powers?

494. "THE POWERS NOT DELEGATED." That the States retained the power to incorporate State banks has never been denied. The only question has been as to the power of Congress to incorporate a national bank; and that has been concluded by the case of *McCulloch v. Maryland*, 4 Wheat., 316. (*Osborn v. The United States Bank*, 9 Wheat., 316; *United States Bank v. Planter's Bank of Georgia*, 9 Wheat., 804, 904.) Justice Nelson, in *Veazie Bank v. Fenno*, 8 Wall., 550, 551.

The right to incorporate banks.
296.

The entire sovereignty of the nation is vested in the State and Federal Governments, except that part of it which is retained by the people, which is solely the right of electing their functionaries. (*Wm. H. Crawford*, 4 Elliott's Debates, 367.) *Metropolitan Bank v. Vandyke*, 27 N. Y. R., 418.

Where is the sovereignty vested?

495. THE SEPARATE POWERS OF THE GOVERNMENTS. The powers of the General Government and of the States, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. And the sphere of action appropriated to the United States is as far beyond the judicial process issued by a State judge or court as if the line of division were traced by landmarks and monuments visible to the eye. The only qualification to this rule of distinct action is in the supremacy of the Constitution, laws, and treaties of the United States, from which it results that if any conflict arise between the enactments of the two sovereignties, or in the enforcement of their asserted authorities, those of the national Government must have supremacy until the question of validity is tried. The Constitution was not framed merely to guard the States against danger from abroad, but chiefly to secure union and harmony at home; and to accomplish this, many of the rights of sovereignty which the States then possessed were ceded to the General Government; and in the sphere of action assigned to it, it was intended that it should be

How are the powers of the Governments separated?

Government.

strong enough to execute its own laws, by its own tribunals, without interruption from the States or their authorities. (*Ableman v. Booth*, 21 How., 506.) *Tarble's Case*, 13 Wall., 403-407.

ARTICLE XI.

How is the judicial power construed? Page 269, notes 270-272.

The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States, by citizens of another State, or by citizens or subjects of any foreign State.

ARTICLE XII.

This is given on page 64, 164, and 401, and need not be here repeated.

ARTICLE XIII.

Repeat the inhibition upon slavery. 274.

¹Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Power to enforce.

²Congress shall have power to enforce this article by appropriate legislation.

Explain the meaning of the inhibition.

496. "NEITHER SLAVERY NOR INVOLUNTARY SERVITUDE." This is not merely a prohibition against the passage or enforcement of any law establishing this relation, but it is also a positive declaration that slavery shall not exist. In the enforcement of the article, therefore, Congress has to deal with the subject-matter. This amendment had the affirmative operation to complete the enfranchisement of four million slaves; and Congress has the power to legislate for the eradication of slavery, and to give full effect to this bestowment of liberty. This is essayed to be done by the civil rights law of 1866. (14 Stat., 27; Paschal's Dig., arts. 5382-5388; and see also act of 31 May, 1870, 16 Stat., 144; Paschal's Dig., arts. 5889-5891; and the act to enforce the rights of the citizen, 31 May, 1870, 16 Stat., 140; Paschal's Dig., arts. 6681-6724.) *The United States v. Cruikshank*, 1 Woods, 318.

The extent of the power.

Congress has the power to make it a penal offense to conspire to deprive a person of the enjoyment of the rights and privileges conferred by this article. But this does not

authorize Congress to pass laws for the punishment of ordinary crimes, such as murders, robberies, assaults, thefts, cognizable in State courts, unless the State should deny the colored class the right to the equal protection of the laws. *The United States v. Cruikshank*, 1 Woods, 319; *United States v. Reese*, (October Term, 1875,) 2 Otto, 000.

Crimes against the State.

497. "NOR INVOLUNTARY SERVITUDE." That it was a personal servitude which was meant is proved by the use of the word "involuntary," which can only apply to human beings. The exception of servitude as a punishment for crime gives an idea of the class of servitude which is meant. The word servitude is of larger meaning than slavery, as the latter is popularly understood in this country, and the obvious purpose was to forbid all shades and conditions of African slavery. It was very well understood that in the form of apprenticeship for long terms, as it had been practiced in the West India Islands on the abolition of slavery by the English Government, or by reducing them to the condition of serfs attached to the plantation, the article might have been evaded, if only the word slavery had been used. The case of the apprentice slave, held under a law of Maryland, liberated by Chief Justice Chase on a writ of *habeas corpus* under this article, illustrates this course of observation. *Matter of Turner*, (Abbott, U. S. R., 84.) *The Slaughter-House Cases*, 16 Wall., 69.

Define and explain servitude.

The same view was taken by Mr. Justice Hunt in *The United States v. Susan B. Anthony* in New York.

We mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppression of those who had formerly exercised unlimited dominion over him. It is true that only the 15th amendment in terms mentions the negro race by speaking of his color and his slavery; but it is just as true that each of the other articles was addressed to the grievances of that race and designed to remedy them as the 15th.

Was the amendment intended to relate exclusively to slaves?

We do not say that no one else but the negro can share in this protection. Both the language and spirit of these articles are to have their fair and just weight in any question of construction. Undoubtedly, while negro slavery alone was in the mind of the Congress which proposed the 13th article, it forbids any other kind of slavery, now or hereafter. If Mexican peonage, or the Chinese coolie labor system, shall develop slavery of the Mexican or Chinese race within our territory, this amendment may safely be trusted to make it void. And so, if other rights are assailed by the States, which properly and necessarily fall within the protection of these articles, that protection will apply, though the party interested may not be of African descent. But what we do say, and what we wish to have understood, is,

May others than the negroes share in the protection?

Look to the purpose. that in any fair and just construction of any section or phrase of these amendments, it is necessary to look always to the purpose which we have said was the pervading spirit of them all, the evil which they were designed to remedy, and the process of continual addition to the Constitution, until that purpose was supposed to be accomplished as far as constitutional laws can accomplish it. The Slaughter-House Cases, 16 Wall., 71, 72.

The Hampton Roads conference in regard to this amendment.

Lincoln.

Seward.

498. "SHALL EVER EXIST." [I asked Mr. Lincoln what would be the *status* of that portion of the slave population in the Confederate States which had not then (31 Jan., 1865) become free under his proclamation; or in other words, what effect that proclamation would have upon the entire black population? Would it be held to emancipate the whole, or only those who had at the time the war ended become actually free under it? Mr. Lincoln said that was a judicial question. How the courts would decide it he did not know, and could give no answer. His own opinion was that, as the proclamation was a *war measure*, and would have effect only from its being an exercise of the war power, as soon as the war ceased it would be inoperative in the future. It would be held to apply only to such slaves as had come under its operation while it was in active exercise. Mr. Seward confirmed this view, and produced the 13th constitutional amendment, then just published. He said this was done as a *war measure*. If the war were then to cease it would probably not be adopted by a number of States sufficient to make it part of the Constitution; but presented the case in such a light as clearly showed his object to be to impress upon the minds of the commissioners that if the war should not cease this, as a war measure, would be adopted by a sufficient number of States to become a part of the Constitution; and without saying it in direct words, left the inference very clearly to be perceived by the commissioners that his opinion was, if the Confederate States would abandon the war they could of themselves defeat this amendment by voting it down as members of the Union. The whole number of States, it was said, being thirty-six, any ten of them could defeat this proposed amendment. The history of that conference, as far as it has been published officially, is printed in the same volume. The War among the States, vol. II, 610-612. (Appendix R, p. 791, *et seq.*) The Emancipation Cases, 31 Tex., 729, 730.]

What effect has this amendment upon contracts?

499. THE EFFECT UPON CONTRACTS. He denied that the XIIIth amendment was necessary to free slaves in the insurgent States, and insisted that it was finally destroyed in Texas by the proclamation of General Granger on 19 June, 1865, and hence that down to that time the slaves were chattels and a valuable consideration for contracts. The Emancipation Cases, 31 Tex., 532-534. And so it was since held by

all the court. *Angier v. Black*, 32 Tex., 168; *Ward v. Bledsoe*, 32 Tex., 251; *McDaniel v. White*, 32 Tex., 489. Time when.

The pecuniary loss by emancipation fell upon the proprietor of the thing at the time of the *vis major*. *Osborn v. Nicholson*, 13 Wall., 659; *The Emancipation Cases*, 31 Tex., 528; *Paschal's Digest of Decisions*, §§ 10094-10112.

Congress authorized the State to frame a new constitution, and it elected to proceed within the scope of the authority conferred. The result was submitted to Congress as a voluntary and valid offering, and was so received and so recognized in the subsequent action of that body. The State is estopped to assail it upon the assumption that the people were not the actors. Upon the same grounds it might deny the validity of its ratification of the constitutional amendments. The action of Congress upon the subject cannot be inquired into. The judicial is bound to follow the action of the political department of the Government, and is concluded by it. The reconstruction of Georgia.

Luther v. Borden, 7 How., 43, 47, 57; *Rose v. Himely*, 4 Cr., 272; *Gelston v. Hoyt*, 3 Wheat., 324; *Williams v. The Suffolk Ins. Co.*, 13 Pet., 420.) Neither before nor after secession had Georgia the right to adopt this provision, which annihilates all pre-existing contracts given for slaves. As to such contracts the constitution of Georgia is itself a nullity. *White v. Hart*, 13 Wall., 652, 654. The note was given for a slave, with warranty of title and that he was a slave for life. The plea was that the slave became free in 1862. We lay out of view *in limine* the constitution of Arkansas of 1868, which annuls all contracts for the purchase or sale of slaves, and declares that no court of the State should take cognizance of any suit founded on such a contract, and that nothing should ever be collected upon any judgment or decree which had been, or should thereafter be, "rendered upon any such contract or obligation." As to all prior transactions the constitution is, in each of the particulars specified, clearly in conflict with that clause of the Constitution of the United States which ordains that "no State shall" "pass any law impairing the obligation of contracts." *(Von Hoffman v. The City of Quincy*, 4 Wall., 535; *White v. Hart*, 13 Wall., 646.) *Osborn v. Nicholson*, 13 Wall., 656. Estoppel.

The inviolability of contracts.

This contract, when made, could have been enforced in the courts of every State of the Union, and in the courts of every civilized country elsewhere. In the celebrated case of *Somerset*, Lord Mansfield said: "A contract for the sale of a slave is good here. The sale is a matter to which the law properly and readily attaches, and will maintain the price according to the agreement. But *here* the *person* of the slave himself is immediately the object of inquiry, which makes a very material difference." (20 Howell's State Trials, 79; *Madrado v. Willes*, 3 Barn. & Ald., 353; *Santos v. Illidge*, 98 Eng. Com. Law, 861; *The Antelope*, 10 Wheat., 66; *Emerson v. Howland*, 1 Mason, 50; *Commonwealth v. Aves*, 18 Pick., The contract being valid when made remained valid.

Cases.

215; *Groves v. Slaughter*, 15 Pet., 449; *Andrews v. Hensler*, 6 Wall., 254.) *Osborn v. Nicholson*, 13 Wall., 656, 657.

The warranty.

This warranty embraces four points: that the slave was sound in body; that he was sound in mind; that he was a slave for life; and that the seller's title was perfect. He was not a perpetual assurer of soundness of mind, health of body, or continuity of title. A change of ownership and possession of real estate by the process of eminent domain is not a violation of the covenant for quiet enjoyment. (*Frost v. Earnest*, 4 Whart., 76; *Ellis v. Welch*, 6 Mass., 246.) Nor is it such an eviction as will support an action for a breach of the covenant of general warranty. In *Dobbins v. Brown*, 12 Penn., 80, it was said by the court: "It will scarcely be thought that a covenant of warranty extends to the State in the exercise of its eminent domain." *Osborn v. Nicholson*, 13 Wall., 657.

Vested rights.

Before the XIIIth amendment was adopted the rights of the vendors of slaves at anterior dates had become completely vested; and it would be contrary to reason and to one of the most vital ends of government to say that the contracts were destroyed by emancipation. (*Prigg v. Pennsylvania*, 10 Pet., 11; *Calder v. Bull*, 3 Dallas, 388.) Such a deprivation would be without "due process of law." This is forbidden by the fundamental compact, and is beyond the sphere of the legislative authority both of States and the nation. (*Taylor v. Porter*, 4 Hill, 146; *Wynehamer v. The People*, 3 Kern, 394; *Wilkinson v. Leland*, 2 Pet., 658.) *Osborn v. Nicholson*, 13 Wall., 662.

ARTICLE XIV.

Who are citizens?

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State

Inhibitions upon the States.

wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Give the history of the subject.

500. "ALL PERSONS BORN OR NATURALIZED IN THE UNITED STATES." This opens with a definition of citizenship—not only citizenship of the United States, but citizenship of the States. No such definition was previously found in the Constitution, nor had any attempt been made to define

it by act of Congress. [The civil-rights law of 1866 ought to have been excepted.] It had been the occasion of much discussion in the courts, by the executive departments, and in the public journals. It had been said by circuit judges that no man was a citizen of the United States except as he was a citizen of one of the States composing the Union. Those, therefore, who had been born and resided always in the District of Columbia or in the Territories, though within the United States, were not citizens. Whether this proposition was sound or not had never been judicially decided. But it had been held by this court, in the celebrated *Dred Scott* case, (18 How.,) that a man of African descent, whether a slave or not, was not and could not be a citizen of a State or of the United States. This decision had never been overruled; and if it was to be accepted as a constitutional limitation of the right of citizenship, then all the negro race who had recently been made freemen were still, not only not citizens, but were even incapable of becoming so by anything short of an amendment to the Constitution.

Definition
of citizen-
ship.

Dred Scott.

To remove this difficulty primarily, and to establish a clear and comprehensive definition of citizenship of the United States, and also of a State, the first clause of the first section was framed :

“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”

This puts at rest both the questions which we stated to have been the subject of differences of opinion. It declares that persons may be citizens of the United States without regard to the citizenship of a particular State, and it overturns the *Dred Scott* decision by making all persons born within the United States, and subject to its jurisdiction, citizens of the United States.

What does
this put to
rest?

The distinction between citizenship of the United States and of a State is clearly recognized and continued. Not only may a man be a citizen of the United States without being a citizen of a State, but an important element is necessary to convert the former into the latter. He must reside within the State to make him a citizen of it; but it is only necessary that he should be born or naturalized in the United States to be a citizen of the Union. It is quite clear, then, that there is a citizenship of the United States and a citizenship of a State which are distinct from each other, and which depend upon different characteristics or circumstances in the individual. The *Slaughter-House Cases*, 16 Wall., 73. Affirmed. *The United States v. Cruikshank*, (October Term, 1875,) 2 Otto, 000. [The conclusion is not so clear as to those residing in the District of Columbia or the Territories. It can only be supported upon the admissible theory that these political divisions are, for some purposes, States.]

What is the
distinction
between
citizenship
of the
United
States and
of a State?

What is the deduction from this?

501. "NO STATE SHALL MAKE OR ENFORCE ANY LAWS WHICH SHALL ABRIDGE THE PRIVILEGES OR IMMUNITIES OF CITIZENS OF THE UNITED STATES." It is a little remarkable, if this clause was intended as a protection to the citizen of a State against the legislative power of his own State, that the words "citizens of the State" should be left out, when they are so carefully used, and used in contradistinction to citizen of the United States, in the very sentence which precedes it. It is too clear for argument that the change in phraseology was adopted intentionally. The Slaughter-House Cases, 16 Wall., 73, 74. [This takes what is said in the preceding sentence as a demonstrable truth. There never ought to have been any doubt that the immigrants to the District and Territories, and naturalized there, were as much citizens of the United States as those residing in the States of the Union. But the language of the amendment does not dispel the mist which the names of political corporations have caused.]

Remark.

Does this clause give any additional strength?

502. "PRIVILEGES OR IMMUNITIES." Of the privileges and immunities of the citizen of the United States, and of the privileges and immunities of the citizen of the State, and what they respectively are, we will presently consider; but we wish to state here that it is only the former which are placed by this clause under the protection of the Federal Constitution, and that the latter, whatever they may be, are not intended to have any additional protection by this paragraph of the amendment. If, then, there is a difference between the privileges and immunities belonging to a citizen of the United States as such, and those belonging to the citizen of a State as such, the latter must rest for their security and protection where they have heretofore rested, so far as this paragraph is concerned, for they receive no additional aid from it.

The first occurrence of the words privileges and immunities in our constitutional history, is to be found in the fourth of the articles of the old confederation, (p. 10, sec. IV, quoted; also art. IV, sec. 10, of the Constitution.)

Page 10.

The purpose of both these provisions is the same, and the privileges and immunities intended are the same in each. In the article of the confederation we have some of these specifically mentioned, and enough perhaps to give some general idea of the class of civil rights meant by the phrase.

The leading case.

The leading case on the subject is that of *Corfield v. Corryell*, 4 Wash. C. C. R., 471; *Ward v. Maryland*, 12 Wall., 430. They are, in the language of Judge Washington, those rights which are fundamental. Throughout his opinion they are spoken of as rights belonging to the individual as a citizen of a State. They are so spoken of in the constitutional provision which he was construing. And they have always been held to be the class of rights which the State gov-

ernments were directed to establish and secure. Slaughter- Authority.
House Cases, 16 Wall., 75, 76.

Women are "PERSONS" within this provision, and so they Are women
are "CITIZENS OF THE UNITED STATES," and it did not citizens?
need this amendment to give them that position. The definition is new, but it is embraced in the very idea of a political community or nation, which is an association of persons for the promotion of their general welfare. Each person so associated becomes a member of the nation, to which he owes allegiance and from which he is entitled to protection, these being reciprocal obligations. The designations of such persons are "subjects," "inhabitants," and "citizens," the choice depending upon the form of government. Citizen is better suited to the description of one living under a republican government, and has been so used by the States from their separation from Great Britain, and it was afterwards adopted in the articles of confederation and the Constitution of the United States. *Minor v. Happersett*, 21 Wall., 165, 166.

Designations.

Every citizen of the United States is also a citizen of a State or Territory. He owes allegiance to two sovereigns, and may be punished for an infraction of the laws of either. The same act may be an infraction of the laws of both. (*Moore v. Illinois*, 14 How., 20.) *The United States v. Cruikshank*, 1 Woods, 324.

This Constitution was established by the people of the United States, who were those of the several States which had separated from Great Britain, so that they *ipso facto* became citizens of the United States. Additions might always be made by birth and naturalization, but as to who are naturally born we must look to other definitions. All children born of citizen parents within the jurisdiction of the United States are themselves citizens. Alien women and minors could always be made citizens. *Minor v. Happersett*, 21 Wall., 167-169.

Who established the Constitution?

CITIZENS, within the meaning of this article, must be natural, and not artificial persons, therefore a corporate body is not a citizen of the United States within its provisions. *The Insurance Co. v. New Orleans*, 1 Woods, 87, 88.

Citizens.

The accused, though a rebel, has the right to appear and contest the proceedings. (*McVeigh v. The United States*, 11 Wall., 159.) *The Confiscation Cases*, 1 Woods, 230.

This adds nothing to the rights of one citizen as against another. It simply furnishes an additional guaranty against any encroachment by the States upon the fundamental rights which belong to every citizen as a member of society. As was said by Mr. Justice Johnson, in *Bank of Columbia v. Oakly*, 4 Wheat., 244, it secures "the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice." *United States v. Cruikshank*, (October Term, 1875,) 2 Otto, 000.

Does the amendment add anything to the rights?

How is the amendment to be enforced?

503. "NO STATE SHALL MAKE OR ENFORCE ANY LAW WHICH SHALL ABRIDGE THE PRIVILEGES AND IMMUNITIES OF CITIZENS OF THE UNITED STATES." The manner of enforcing this amendment will depend on the character of the privilege or immunity in question. If simply prohibitory of governmental action, there will be nothing to enforce until such action is undertaken. When the provision is violated by an obnoxious law, such law is void, and all acts under it will be trespasses. The legislation required would be a preventive or compensative remedy. The United States *v. Cruikshank*, 1 Woods, 327.

What are privileges and immunities?

In *Paul v. Virginia* (8 Wallace, 180) the court, in expounding this clause of the Constitution, says that "the privileges and immunities secured to citizens of each State in the several States are those which are common to the citizens in the latter States, under their constitutions and laws, by virtue of their being citizens." The constitutional provision there alluded to did not create those rights, which it called privileges and immunities of citizens of the States; it threw around them in that clause no security for the citizen of the State where exercised, nor did it pretend to curtail the power of the States over them. Its sole purpose was to declare to the several States that whatever those rights are, as you grant or establish them, or as you limit or qualify them, or impose restrictions on their exercise, the same, no more nor less, shall be the measure of the rights of citizens of other States within your jurisdiction.

Powers of States remain.

Was it the purpose of the framers of the fourteenth amendment, by the simple declaration that no State shall make or enforce any laws which shall abridge the privileges and immunities of citizens of the United States, to transfer the security and protection of all the civil rights which we have mentioned from the States to the federal Government? And where it is declared that Congress shall have power to enforce that article, was it intended to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States? The majority of the court thought not.

No case in this court until that of *Ward v. Maryland* in 1872 required a consideration of those words as used in the original Constitution in reference to citizens of the States.

What are some of the rights of the citizen?

One of these is well described in the case of *Crandall v. Nevada*, 6 Wallace, 36. It is said to be the right of the citizen of this great country, protected by implied guaranties of its Constitution, "to come to the seat of government to assert any claim he may have upon that Government, or transact any business he may have with it, to seek its protection, to share its offices, to engage in administering its functions. He has the right to free access to its seaports, through which all operations of foreign commerce are conducted, to the sub-treasuries, land offices, and courts of justice in the several States." And, quoting from the language of Chief Justice

Taney, in another case, it is said "that for all the great purposes for which the Federal Government was established we are one people, with one common country. We are all citizens of the United States;" and it is as such citizens that these rights are supported in this court in *Crandall v. Nevada*. Taney.

Another privilege of a citizen of the United States is to demand the care and protection of the Federal Government over his life, liberty, and property when on the high seas, or within the jurisdiction of a foreign government. Of this there can be no doubt, nor that the right depends upon his character as a citizen of the United States. The right to peaceably assemble and petition for a redress of grievances, the privilege of the writ of *habeas corpus*, are rights of the citizen guaranteed by the Federal Constitution. The right to use the navigable waters of the United States, however they may penetrate the territories of the several States, all rights secured to our citizens by treaties with foreign nations, are dependent upon citizenship of the United States and not citizenship of a State. One of these privileges is conferred by the very article under consideration. It is, that being a citizen of the United States any person can of his own volition become a citizen of any State of the Union by acquiring a residence therein, with the same rights as other citizens of that State. And others?

We are not without judicial interpretation, therefore, both State and national, of the meaning of this clause. It is sufficient to say here that under no construction of the third provision that we have ever seen, nor any that we deem admissible, can the restraint imposed by the State of Louisiana upon the exercise of their trades by the butchers of New Orleans be held to be a deprivation of property within the meaning of that provision. *Slaughter House Cases*, 16 Wall., 76, 77. What are not?

504. "NOR SHALL ANY STATE DENY TO ANY PERSON WITHIN ITS JURISDICTION THE EQUAL PROTECTION OF THE LAWS." In the light of the history of these amendments, and the pervading purpose of them, it is not difficult to give a meaning to this clause. The existence of laws in the States where the newly-emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the end to be remedied by this clause, and by it such laws are forbidden. But if the States did not conform their laws to its requirements, then by the fifth section of the article Congress was authorized to enforce it by suitable legislation. (*The Slaughter-House Cases*, 75-82. Define this clause.

Justice Field read the dissenting opinion on behalf of the Chief Justice, Justices Swayne, Bradley, and himself. And Mr. Justice Bradley dissented in an able opinion. State laws.

Define this clause.

505. "NOR SHALL ANY STATE DEPRIVE ANY PERSON OF LIFE, LIBERTY, OR PROPERTY WITHOUT DUE PROCESS OF LAW." Prior to the amendments the police laws regulating the traffic in liquor raised no question under the Federal Constitution. *Wynelhamer v. The People*, 3 Kern., 486, is a single case denying the power of a State to destroy the traffic in liquor. And this right is not one of those growing out of the citizenship of the United States. (*Slaughter-House Cases*, 16 Wall., 36.) *Bartemyer v. Iowa*, 18 Wall., 132, 133. Justices Bradley, Field, and Swayne concurred, but denied the applicability of the *Slaughter-House Case*, and also the soundness of that case.

Dissentient opinion.

Mr. Justice Field, in a very able opinion, insisted that the XIVth amendment had taken away the power of the State to parcel out to favorite citizens the ordinary trades and callings of life; and that while prior to this and the XIIIth amendment the States had supreme authority over all such matters; and the national Government, except in a few particular cases, could afford no protection to the individual against arbitrary and oppressive legislation. He concludes that the amendments grew out of the feeling that the Union was worthless if every citizen could not be protected in all his fundamental rights everywhere; that the amendments were not primarily intended to confer citizenship on the negro race—they had a broader purpose; were intended to justify legislation, extending the protection of the national Government over the common right of *all* citizens, and thus to obviate the objections to legislation for the mere protection of the emancipated race. It was intended to make it possible for *all* persons, of every race and color, to live in peace and security wherever the jurisdiction of the nation extended.

The XIVth amendment recognized a national citizenship, and declared that the privileges and immunities which embrace the fundamental rights, which belong to all citizens of free governments should not be abridged by any State. This national citizenship is primary, not secondary. *Bartemyer v. Iowa*, 18 Wall., 137-141.

What are the basis of representation and the exceptions?

SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a State, or the members of the legislature thereof, is denied to any

of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

The male
inhabit-
ants.

506. "REPRESENTATIVES SHALL BE APPORTIONED AMONG THE SEVERAL STATES ACCORDING TO THEIR RESPECTIVE NUMBERS." [The views of the editor as to whether section *supra* was clause 3 of section 2, article I, as to direct taxes, has been repealed, are given in note 302. The question is still open, and it is hardly probable that it will be answered by strict logic and the weight of precedent.]

What are
the num-
bers?

Women and children are persons, and so they always were, and citizens likewise. They are counted in the numeration; but they are not necessarily voters. *Minor v. Happersett*, 21 Wall., 174.

507. "COUNTING THE WHOLE NUMBER OF PERSONS." The Committee on Apportionment reported the following basis of representation in Congress, under the ninth census, which was adopted in the acts of 2 February, 1872, and May 30, 1872, and re-enacted in the Revised Statutes, sec. 20. The right-hand column is the editor's, showing the representation as it now stands.

How are
representa-
tives appor-
tioned?

Table of Apportionment of Representation according to the Ninth Census.

Table.

Ratio, 131,425.

States.	Representative population.	Number of Representatives on even division.	Fractions.	Representatives on fractions.	Whole number of Representatives	Revised Statute, section 20.
Alabama.....	906,992	7	77,017	1	8	8
Arkansas.....	484,471	3	90,196	1	4	4
California.....	560,247	4	34,547	.....	4	4
Connecticut.....	537,454	4	11,754	.....	4	4
Delaware.....	125,015	1	.....	.....	1	1
Florida.....	187,748	1	56,323	.....	1	2
Georgia.....	1,184,100	9	1,284	.....	9	9
Illinois.....	2,539,891	19	42,810	.....	19	19
Indiana.....	1,680,637	12	103,537	1	13	13
Iowa.....	1,191,792	9	8,967	.....	9	9
Kansas.....	364,399	2	101,549	1	3	3
Kentucky.....	1,321,011	10	6,761	.....	10	10
Louisiana.....	726,915	5	69,790	1	6	6
Maine.....	626,915	4	101,215	1	5	5
Maryland.....	780,894	5	123,769	1	6	6
Massachusetts.....	1,457,351	11	11,676	.....	11	11
Michigan.....	1,184,050	9	1,234	.....	9	9
Minnesota.....	439,706	3	45,431	.....	3	3
Mississippi.....	827,922	6	39,372	.....	6	6
Missouri.....	1,721,295	13	12,770	.....	13	13
Nebraska.....	122,993	1	.....	.....	1	1
Nevada.....	42,491	1	.....	.....	1	1
New Hampshire.....	318,300	2	55,450	.....	2	3
New Jersey.....	906,096	6	117,516	1	7	7
New York.....	4,382,750	33	45,734	.....	33	33
North Carolina.....	1,671,361	8	19,961	.....	8	8
Ohio.....	2,665,200	20	36,760	.....	20	20
Oregon.....	90,923	1	.....	.....	1	1
Pennsylvania.....	3,521,791	26	104,741	1	27	27
Rhode Island.....	217,353	1	85,928	1	2	2
South Carolina.....	705,606	5	48,481	.....	5	5
Tennessee.....	1,258,520	9	75,695	1	10	10
Texas.....	818,579	6	30,629	.....	6	6
Vermont.....	330,551	2	67,701	1	3	3
Virginia.....	1,225,163	9	42,338	.....	9	9
West Virginia.....	442,014	3	47,739	.....	3	3
Wisconsin.....	1,054,670	8	3,270	.....	8	8
Total.....	38,113,253	278	1,721,381	12	290	292

How was the basis reached?

The committee, however, in addition to the twelve members assigned to fractions by the above table, assign one to New Hampshire and one to Florida, making, in all, a House of 292. The reason for this is, that greater injustice will

be done each of these States by not giving it the additional Representative than to the other States by giving it. Fractions.

By this apportionment nine States, to wit: New Hampshire, Vermont, New York, Pennsylvania, Indiana, Tennessee, Louisiana, Alabama, and Florida, get each one more member than the number assigned by the bill which has already become a law, and the committee report the accompanying bill, giving each of these States an additional Representative, and recommend its passage. Ho. Doc. 42d Cong. 2d Sess., No. 28.

By this census three-fifths of four and a half million of "other persons" are counted in the basis of representation who would have been excluded under their former condition. This adds 20 members to the section where they reside. The grievance of those claiming the increase and all the political *status* for themselves, is, that the race votes, and is eligible to the honors, and divides them. Two-fifths counted.

To complete the numbers of people of the United States the following population of the territories is added. The population of the States corresponds with the foregoing table, with a slight variation of 388 :

States and Territories, 1870.

The United States.....	38,558,371	What are the total numbers?
The States.....	38,115,641	
The Territories.....	442,730	
1. Arizona	9	9,658
2. Colorado.....	4	39,864
3. Dakota	8	14,181
4. District of Columbia.....	1	131,700
5. Idaho.....	7	14,999
6. Montana	6	20,595
7. New Mexico.....	2	91,874
8. Utah	3	86,786
9. Washington.....	5	23,955
10. Wyoming.....	10	9,118

Compendium of Census, p. 8.

508. "BUT WHEN THE RIGHT TO VOTE AT ANY ELECTION, &C., IS DENIED, THE BASIS OF REPRESENTATION THEREIN SHALL BE REDUCED," &C. Although some of the States still have a property or educational basis, it is not remembered that any reduction has been claimed on that account. None are now excluded from right to vote because of participation in the rebellion. The attempt in Tennessee, Missouri, and Arkansas broke down. No deduction was made for disqualification of any of the male population as voters. If the right to vote be denied, what is the consequence?

All it did.

This reduction of representation establishes that the question as to who should vote was still left with the States; and it excludes the idea that women, who are not allowed to vote by the State constitutions, may yet assert the right under this amendment. *Minor v. Happersett*, 21 Wall., 177.

What are the relations of the Indians not taxed?

509. "EXCLUDING INDIANS NOT TAXED." The fourteenth amendment has no effect whatever upon the status of the Indian tribes within the limits of the United States, and does not annul the treaties previously made. The relations which exist between the Government and the Indian tribes, making it plain that Congress has uniformly respected the right of the Indians to govern themselves.

How has Congress regarded them?

Congress has never regarded the Indian tribes as subject to the municipal jurisdiction of the United States. On the contrary they have uniformly been treated as nations, and in that character held responsible for the crimes and outrages committed by their members, even outside of territorial limits.

Indians nations?

And inasmuch as the Constitution treats Indian tribes as belonging to the rank of nations, capable of making treaties, it is evident that an act of Congress which should assume to treat the members of a tribe as subject to the municipal jurisdiction of the United States would be unconstitutional and void. In the opinion of the committee the Constitution and the treaties, acts of Congress, and judicial decisions referred to, all speak the same language upon this subject, and all point to the conclusion that the Indians, in tribal condition, have never been subject to the jurisdiction of the United States in the sense in which the term "jurisdiction" is employed in the fourteenth amendment to the Constitution. The Government has asserted a political supremacy over the Indians, and the treaties and laws quoted from, present these tribes as "domestic, independent nations," separated from the States of the Union, within whose limits they are located, and exempt from the operation of State laws, and not otherwise subject to the control of the United States other than is consistent with their character as separate political communities or States. Their right of self-government and to administer justice among themselves after their rude fashion, even to the extent of inflicting the death penalty, has never been questioned. And while the United States have provided by law for the punishment of crimes committed by Indians straggling from the tribes, and crimes committed by Indians upon white men lawfully within the reservations, the Government has carefully abstained from attempting to regulate their domestic affairs and from punishing crimes committed by one Indian against another in the Indian country. Whenever we have dealt with them it has been in their collective capacity as a tribe, and not with their individual members, except when such members were separated from the tribe to which they belonged, and then

Crimes.

we have asserted such jurisdiction as every nation exercises over the subjects of another independent sovereign nation entering its territory and violating its laws. Jurisdiction.

During the war, slavery had been abolished and the former slaves had become citizens of the United States, consequently, in determining the basis of representation in the fourteenth amendment, the clause "three-fifths of all other persons" is wholly omitted, but the clause "excluding Indians not taxed" is retained. The inference is irresistible that the amendment was intended to recognize the change in the status of the former slave which had been effected during the war, while it recognizes no change in the status of the Indians. * * * The Indians were excluded because they were not citizens. For these reasons the committee do not hesitate to say that the Indian tribes within the limits of the United States, and the individuals, members of such tribes, while they adhere to and form a part of the tribes to which they belong, are not, within the meaning of the fourteenth amendment, "subject to the jurisdiction" of the United States, and therefore that such Indians have not been made citizens of the United States by virtue of that amendment; and the committee say that if they are correct in this conclusion it follows that the treaties heretofore made between the United States and the Indian tribes are not annulled by that amendment. Slavery. Page 67, clause 3.

Why the Indians are excluded.

The committee say, in conclusion, "it is pertinent to remark that treaty relations can properly exist with Indian tribes or nations only; and that when the members of a tribe are scattered they are merged in the mass of our people and become equally subject to the jurisdiction of the United States. It is believed that some treaties have been concluded and ratified with fragmentary straggling bands of Indians who had lost all just pretensions to the tribal character, and this ought to admonish the treaty-making power to use greater circumspection hereafter." (Carpenter's Report, 14 Dec., 1870.) How can treaty relations exist?

So far as this report denies citizenship to the Indian tribes it may be correct, because the people did not intend otherwise in adopting the amendment. But the assumption that the tribes are independent sovereign States is not supported by judicial authorities or legislative action. They are dependent subordinate States. *Worcester v. Georgia*, 6 Pet., 515. Remarks.

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Repeat the disqualifying clause

The officers
disquali-
fied.

Congress, or as an officer of the United States, or as a member of any State Legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may, by a vote of two-thirds of each House, remove such disability.

Who are in-
cluded in
the disa-
bility?
Page 250,
note 412.

510. "HAVING PREVIOUSLY TAKEN AN OATH." It will be observed that the persons included in this disability clause are the same who had taken an official oath under clause 3 of article VI. It was intended to make the obligations of the official oath to support the Constitution of the United States higher than the natural allegiance which every man bears to his Government. And it is not confined to those who are or were in official position at the time of engaging in insurrection, rebellion, or treasonable practices.

What is the
true gram-
matical
construc-
tion of this
phrase?

511. "SHALL HAVE ENGAGED IN INSURRECTION OR REBELLION," &c. The grammatical form of the sentence places the verb in the future perfect tense, or, as older grammarians called it, in the future pluperfect tense. The nominative or subject of this verb is "who," which is the pronoun for the antecedent "person." Grammatically construed, the sentence would mean that no person, who, having taken the official oath required by article VI, clause 3, who afterward shall have engaged in insurrection, &c., shall be a Senator, Representative in Congress, or hold office.

Page 250,
clause 3,
note 412.

And viewed as an amendment to article VI, clause 3. (to which it properly belongs,) it would read:

"The Senators and Representatives before mentioned, and the members of the several State Legislatures, and all executive and judicial officers, both of the United States and of the several States, shall be bound, by oath or affirmation, to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States." With the amendment:

"But if any of these persons, after having taken this oath, shall engage in insurrection or rebellion against the United States, or give aid or comfort to the enemies thereof, he shall not hold any of these offices, until Congress, by a vote of two-thirds of each House, shall have removed such disability."

What is the
grammatical
construc-
tion of the
sentence?

Thus viewed it would have no reference to the past, and, for the future it would be a wholesome, conservative guaranty for peace. Those who oppose this grammatical construction

derive little aid from the participial phrase, "who having previously taken an oath." This fixes a point of time anterior to the act of treason, which is necessary to the idea of a perfect future tense. Indeed, they would force the sentence to read: "No person, who, having previously taken an oath to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same," "shall be a Senator," &c. Criticism.

But the grammatical construction has never arrested the attention of the Congress which proposed the amendment, the thousands of legislators who voted its ratification, the thousands whose disabilities have been removed, nor the Congressmen who have voted the acts of oblivion. By common consent they construe the sentence as though it read "No person shall be a Senator, &c., who, having previously taken the official oath to support the Constitution of the United State *has* engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof." Thus the amendment has been made to apply to, and exhaust itself upon, the late rebellion. The author would be called little less than a lunatic who should insist that the future form of the verb is never substituted for the imperfect or perfect tense. And did not the author believe that his book will be read after the generation which perpetrated the literary and more serious blunders of the unhappy civil war, shall have passed away, he would not have ventured upon the suggestion of inapt grammar. The common error.

512. "BUT CONGRESS MAY BY A TWO-THIRDS VOTE REMOVE SUCH DISABILITY." It has been variously estimated that at the time of its original insertion in the Constitution it included somewhere from 15,000 to 30,000 persons, but as near as I can gather from the facts in the case it included only 18,000 men in the South. This disability was hardly fixed on the South until we began in this hall and in the Senate chamber, (when we had more than two-thirds Republican in both branches,) to remove it, and the very first bill took that disability from 1,578 citizens of the South. The next bill took it from 3,526 gentlemen. After these bills specifying individuals had passed through, small bills, which I will not further refer to, were passed. In 1872 the Congress of the United States, by the vote of two-thirds of both branches, passed this general law: "That all political disabilities imposed under the third section of the fourteenth amendment of the Constitution of the United States are hereby removed from all persons whomsoever, except Senators and Representatives in the Thirty-sixth and Thirty-seventh Congresses, officers of the judicial, military, and naval service of the United States, heads of departments, and foreign ministers of the United States." Since that act passed a very considerable number of gentlemen included in it have been specially by name relieved Repeat the history of this removal of disabilities.

Blaine. from disability ; but I believe, in no single instance, since the act of May, 1872, have disabilities been taken from any man unless on his respectful petition to Congress asking that they should be removed ; and I believe, that in no instance, except one, has such a petition been refused. I have had occasion, by conferences with the Departments of Navy and War, and by reference to some other records, to be able to state to the House, with more accuracy than has been already stated, the number of gentlemen who are still under disabilities. Those who were officers of the United States army, educated at the expense of the Government at West Point, and who joined the rebellion, and are still under disabilities, are estimated at the War Department at 325. The number of such persons in the navy are 295, and those coming under the other heads, members of the Thirty-sixth and Thirty-seventh Congresses, judges, heads of departments, and foreign ministers, I am not able to give the number exactly, but the whole number of persons now under disability in the South is about 750. (Speech of Mr. Blaine, on his amendment to exclude Jefferson Davis from general amnesty, January, 1876.)

There yet remains.

What are the restrictions as to the validity of the public debt?

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave ; but all such debts, obligations, and claims shall be held illegal and void.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

ARTICLE XV.

What is the restriction as to voting?

SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State, on account of race, color, or previous condition of servitude.

SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.

513. "SHALL NOT BE DENIED OR ABRIDGED." Although negative in form, in substance this article confers a positive right which did not exist before. The right shall not be denied; it shall be enjoyed, and the party shall be exempt from the disability of race, color, or previous condition of servitude, as respects the right to vote. In terms it has a general application to all, but from its history it was principally intended to confer upon the colored race the right to citizenship. (*The Slaughter-House Case*, 16 Wall., 81.) *The United States v. Cruikshank*, 1 Woods, 321.

What is the the interpretation of this amendment?

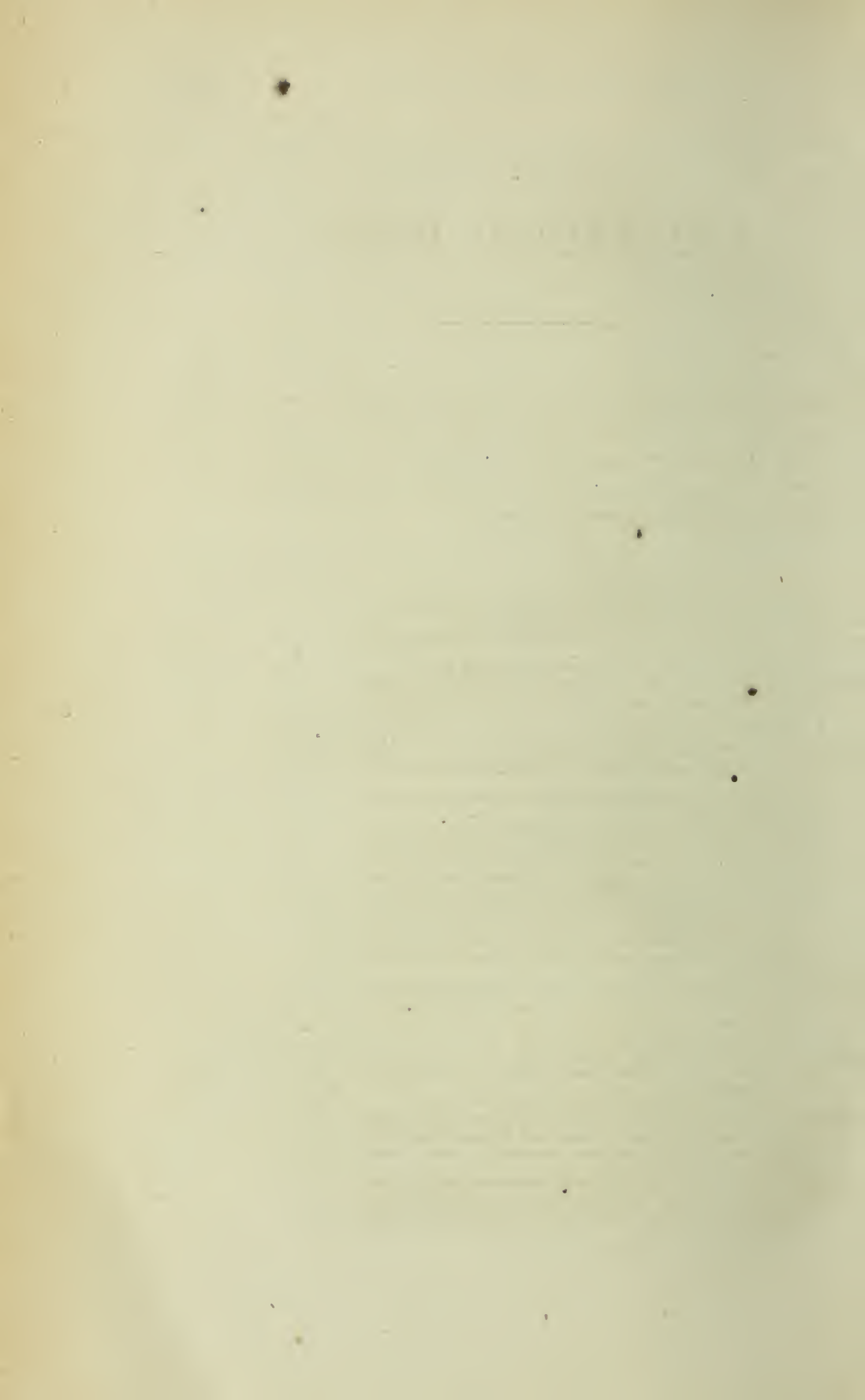
This amendment gives no new right to regulate elections, except to enforce this inhibition. It relates only to discriminations on account of race, color, or previous condition of servitude and is a prohibition against making such discriminations. The enforcement act, in so far as it is general and universal in its application, is unconstitutional. *Id.*

The amendment does not confer the right of suffrage upon any one. It prevents the States or the United States, however, from giving preference, in this particular, to one citizen of the United States over another, on account of race, color, or previous condition of servitude. Before its adoption this could be done. It was as much within the power of a State to exclude citizens of the United States from voting on account of race, &c., as it was on account of age, property, or education. Now it is not. If citizens of one race, having certain qualifications, are permitted by law to vote, those of another having the same qualifications must be. Previous to this amendment there was no constitutional guaranty against this discrimination. Now there is. It follows that the amendment has invested the citizen of the United States with a new constitutional right which is within the protecting power of Congress. That right is exemption from discrimination in the exercise of the elective franchise, on account of race, color, or previous condition of servitude. This, under the express provisions of the second section of the amendment, Congress may enforce by "appropriate legislation." *United States v. Reese*, (October Term, 1875,) 2 Otto, 000.

Does it confer the right of suffrage?

A statute which creates a new offense under this act should be clear and explicit. That in existence fails of its object, (16 Stat., 140.) *Id.* The right of suffrage is not a necessary attribute of national citizenship, but an exemption from discrimination in the exercise of that right on account of race, &c., is. The right to vote in the States comes from the States, but the right of exemption from the prohibited discrimination comes from the United States. The first has not been granted or secured by the Constitution of the United States, but the last has been. *United States v. Cruikshank*, (October Term, 1875,) 2 Otto, 000.

From whence is derived the right of suffrage?



ANALYTICAL INDEX.

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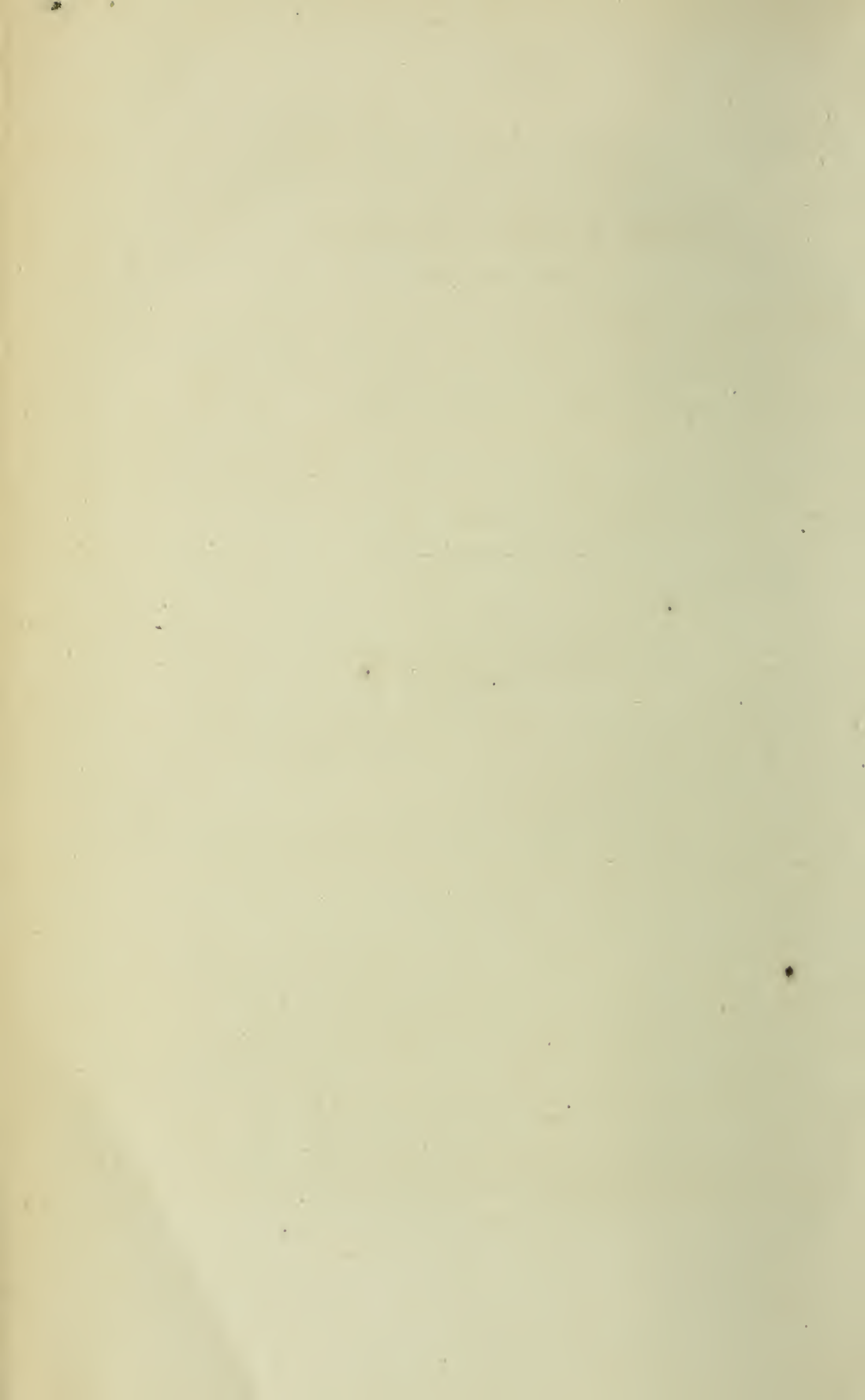
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- COMMANDER IN CHIEF.** The President shall be, of, &c. Art. II, sec. 2, cl. 1, p. 407. History of the commission to Washington. 415.
- COMMERCE.** Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes. Art. I, sec. 8, cl. 3, p. 365. The term defined. 363. What commerce among the several States includes. 364. How far exclusive in Congress. 365. Quarantine regulations. 366. Navigation. 367. With the Indian tribes. 368.
- No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another. Art. I, sec. 9, cl. 6, p. 392. To hinder would be a *casus omissus*. 296.
- Includes business carried on by corporations and individual traders. 363. And railroads operating continuous lines. 364. The question of power has always been difficult. 365. The States may enact quarantine laws, but not to interfere with commerce. 366. As used in the Constitution, it includes navigation, traffic, and trade. 367. Taxes and inspection laws are under its control. 367. The Indian tribes subject to internal revenue. 368. Their countries compose part of the United States. Id.
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- COMMON LAW.** In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law. This article explained. 492, 493. Art. VII, p. 476.
- And the acts of Congress form the rules of practice. 394.
- COMPACT.** No State shall, without the consent of Congress, enter into any compact or agreement with another State, or with a foreign power. Art. I, sec. 10, cl. 3, p. 397.
- COMPENSATION.** The President shall, at stated times, receive for his services a compensation which shall neither be increased nor diminished during the period for which he shall have been elected. Art. II, sec. 1, cl. 6, p. 405.
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- Criticism upon the time at which the President's, may be increased. 413.
- COMPULSORY PROCESS.** The accused shall have compulsory process for obtaining witnesses in his favor. Art. VI, p. 474.
- CONCURRENCE.** Every order, resolution, or vote, where it is necessary, shall be presented to the President, as in case of a bill. Art. I, sec. 7, cl. 3, p. 363.
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- CONFEDERATION.** No State shall enter into any. Art. I, sec. 10, cl. 1, p. 393.
- Its debts and engagements transferred against the United States. Art. VI, cl. 1, p. 459.
- CONFESSION.** No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court. Art. III, sec. 3, cl. 1, p. 443.
- CONFISCATION.** The act has two distinct parts. 397. Rights of intervenors. Id. Under the confiscation act of 1862 the life estate of the offender passed, and upon his death the fee passed to his heirs. 461.
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No person holding any office under the United States shall, without the consent of the Congress, accept of any present, &c., from any foreign power. Art. I, sec. 9, cl. 8, p. 393. Nor shall any State, without such consent, lay any imposts or duties on imports or exports. Id., sec. 10, cl. 2, p. 395. Nor lay any duty of tonnage, nor keep troops, &c. Id., cl. 3, p. 397.

Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. Art. I, p. 466.

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The President shall, from time to time, give to the Congress information of the state of the Union. Art. II, sec. 3, p. 420.

And in such inferior courts as the Congress may from time to time ordain and establish. Art. III, sec. 1, p. 427.

But when crimes are not committed in any State, the trial shall be at such place or places as Congress may by law have directed. Art. III, sec. 2, cl. 3, p. 443.

The Congress shall have power to declare the punishment of treason. Art. III, sec. 3, cl. 2, p. 443.

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- CORRUPTION OF BLOOD.** No attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted. Art. I, sec. 3, cl. 2, p. 443.
- COUNSEL.** The accused shall have the assistance of counsel for his defense. Art. VI, p. 474.
- COUNTRY.** Commercially, this is but one. 296.
- COURT.** No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court. Art. III, sec. 3, cl. 1, p. 443.
- COURTS OF LAW.** Congress may by law vest the appointment of such inferior officers as they think proper in the President alone, in the courts of law, or in the heads of departments. Art. II, sec. 2, cl. 2, p. 412.
- CREDIT.** Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. Art. IV, sec. 1, p. 447.
- CRIMES.** All civil officers of the United States shall be removed from office on impeachment for and conviction of treason, bribery, or other high crimes and misdemeanors. Art. II, sec. 4, p. 423.
- The trial of all crimes, except in cases of impeachment, shall be by jury, and in the State where said crime shall have been committed. Art. III, sec. 2, cl. 3, p. 443.
- A person charged in any State with treason, felony, or other crime, who shall flee from justice, &c., shall be delivered up. Art. IV, sec. 2, cl. 2, p. 453.
- No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury. Art. V, p. 470. The indictment is good without declaring the jurors are a grand jury. 485. Except as a punishment for crime whereof the party shall have been duly convicted. Art. XIII, cl. 1, p. 478.
- Except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State. Art. XIV, sec. 2, p. 488.
- Committed in forts, arsenals, dock-yards, &c., are under the exclusive jurisdiction of the United States. 386.
- CRIMINAL CASE.** No person shall be compelled, in any criminal case, to be a witness against himself. Art. V, p. 470.
- CRITICISM.** Upon the power in practice. 416. Proceedings in Cabinet not allowed as evidence. Id.

D.

- DANGER.** No State shall, without the consent of Congress, engage in war, unless actually invaded, or in such imminent danger as will not admit of delay. Art. I, sec. 10, cl. 3, p. 397.
- Except in cases arising in the land and naval forces, or in the militia, when in time of war or public danger. Art. V, p. 470.
- DEATH.** In case of the death, resignation, &c., of the President, who shall serve. Art. II, sec. 1, cl. 5, p. 404.
- DEBATE.** For any debate or speech in either House, the members shall not be questioned in any other place. Art. I, sec. 6, p. 361.
- DEBTS.** To pay the debts of the United States. Art. I, sec. 8, cl. 1, p. 365. Amount of debts. 360.
- No State shall make anything but gold and silver coin a tender in payment of debts. Art. I, sec. 10, cl. 1, p. 393.
- All debts contracted, and engagements entered into, &c., to be valid against the United States. Art. VI, cl. 1, p. 459.
- DE FACTO GOVERNMENT.** As to choice of Senators. P. 314, n. 311.
- The sovereign power may reside in a, for a time. 334. The term defined. Id. How their existence may be maintained. Id.
- DEFENSE.** The accused shall have the assistance of counsel for his defense. Art. VI, p. 474.
- DELAY.** No State shall, without the consent of Congress, engage in war, unless actually invaded, or in such imminent danger as will not admit of delay. Art. I, sec. 10, cl. 3, p. 397.
- DELEGATES.** Have always been admitted from legally organized territories. 306. New Mexico not entitled to, until organized. Id.
- DEMAND.** Shall, on demand of the executive authority of the State from which he fled, be delivered up. Art. IV, sec. 2, cl. 2, p. 453.
- DEPARTMENTS.** Vested in any department or officer thereof. Art. I, sec. 8, cl. 18, p. 367. Of the Government are co-ordinate. 478, p. 461.

- DIRECT TAXES.** Representatives and direct taxes shall be apportioned according to numbers. Art. I, sec. 2, cl. 3, p. 305. No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken. Art. I, sec. 9, cl. 4, p. 392. Query as to the fourteenth amendment upon direct taxes. 302. Defined. 303.
- DISABILITY.** But Congress may, by a vote of two-thirds of each House, remove such disability. Art. XIV, sec. 3, p. 493. The probable numbers who incurred this disability, and who have been relieved or yet remain under it. 512.
- DISAGREEMENT.** In case of disagreement between the two Houses with respect to time, the President may adjourn them to such time as he shall think proper. Art. II, sec. 3, p. 420.
- DISCIPLINE.** Congress may prescribe the discipline of the militia. Art. I, sec. 8, cl. 16, p. 366.
- DISCOVERIES.** Congress may secure, for limited time, to inventors exclusive right to their discoveries. Art. I, sec. 8, cl. 8, p. 365.
- DISCRETION.** All the duties of the President are prescribed by the Constitution and the law. 420.
- DISQUALIFICATION.** For office of honor, trust, or profit under the United States. Art. I, sec. 3, cl. 7, p. 330.
- DISTRICT.** By an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law. Art. VI, p. 474.
- DISTRICTING THE STATES.** The effect of disregarding the mandatory clause. 329. The effect of not districting. 331.
- DISTRICT OF COLUMBIA.** Congress has power to exercise exclusive legislation, &c., over such place as may become the seat of government of the United States. Art. I, sec. 8, cl. 17, p. 366. Is a corporation liable for the acts of its officers. 385. Number of inhabitants by the ninth census. 506.
- DISTURBANCE OF ASSEMBLIES.** The power to punish for, belongs to the States. 483.
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- DOMESTIC TRANQUILLITY.** How secured. P. 303, n. 294.
- DUE PROCESS OF LAW.** No person shall be deprived of life, liberty, or property without due process of law. Art. V, p. 470. This means judicial process, not by the Executive. 487. Due process of law explained. 488. The inhibition applies only to the United States Government. 488. Nor shall any State deprive any person of life, liberty, or property without due process of law. Art. XIV, sec. 1, p. 482. This right is not one growing out of citizenship of the United States. 505.
- DUTIES.** Congress shall have power to lay and collect taxes, duties, imposts, excises, &c. But all should be uniform throughout the United States. Art. I, sec. 8, cl. 1, p. 365. Nor shall vessels bound to or from one State be obliged to enter, clear, or pay duties in another. Art. I, sec. 9, cl. 6, p. 392.
- DUTY.** No tax or duty shall be laid on articles exported from any State. Art. I, sec. 9, cl. 5, p. 392.

E.

- EFFECT.** The Congress may provide the mode of proof and effect of judicial proceedings, &c. 447.
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- ELECTIONS.** Of Senators, and classification of. Art. I, sec. 3, cl. 1, 2, n. 314. To fill vacancies, 309. No case has gone back to the qualifications of the legislators who chose the Senators. 336, p. 341. No magistracy to determine the qualifications of electors. 338, p. 342. Determined by the plurality of votes. 341.
- ELECTORS.** For Representatives, qualifications of. Art. I, sec. 2, cl. 1, p. 303. No Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector. Art. II, sec. 1, cl. 2, p. 400. Number of, in 1876. n. 409a. Each State shall appoint, in such manner as the Legislature thereof may direct, a number of electors equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress. Art. II, sec. 1, cl. 2, p. 400. Shall meet and vote by ballot. Art. XII, p. 401. When the right to vote at any election for the choice of electors for President and Vice President of the United States, &c. Art. XIV, sec. 2, p. 488.

- EMANCIPATION.** Neither the United States, nor any State, shall pay any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void. Art. XIV, sec. 4, p. 496.
- EMOLUMENTS.** No person, &c., shall accept any present, emolument, &c., from any foreign power. Art. I, sec. 9, cl. 8, p. 393.
- ENEMIES.** Treason shall consist in levying war against the United States, or in adhering to their enemies, giving them aid and comfort. Art. III, sec. 3, cl. 1, p. 443. Or give aid or comfort to the enemies thereof. Art. XIV, sec. 3, p. 494. This sentence criticised and explained. 511.
- END.** By granting commissions which shall expire at the end of their next session. Art. II, sec. 2, cl. 3, p. 417.
- ENGAGEMENTS.** All entered into before the adoption of this Constitution shall be valid against the United States. Art. IV, cl. 1, p. 459.
- ENUMERATION.** No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken. Art. I, sec. 9, cl. 4, p. 392. The enumeration in the Constitution of certain rights shall not be construed to disparage others retained by the people. Art. IX, p. 477. Made every ten years, and critical principle of. 308.
- ESTABLISHMENT.** Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. Art. I, p. 466.
- EXCISES.** Congress shall have power to lay and collect taxes, duties, imposts, and excises, &c. Art. I, sec. 8, cl. 1, p. 365. But all should be uniform throughout the United States. Id.
- EXECUTION.** For carrying into execution the foregoing powers. Art. I, sec. 8, cl. 18, p. 367.
- EXECUTIVE.** On application of the executives, when the Legislature cannot be convened, the United States shall protect the States against domestic violence. Art. IV, sec. 4, p. 458.
When the right to vote for executive and judicial officers of a State, or the members of the Legislature thereof, is denied, &c., there shall be a corresponding reduction in the ratio of representation. Art. XIV, sec. 2, p. 488.
- EXECUTIVE OFFICERS.** Cannot be controlled by the judiciary. 435.
- EXECUTIVE POWER.** Shall be vested in the President and Vice President of the United States of America. Art. II, sec. 1, cl. 1, p. 398.
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- EXPATRIATION.** Citizens may expatriate themselves, and how. 369.
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- EXPULSION.** The case of Whittemore. 353.
- EXTRADITION.** Reciprocity treaties concerning naturalization and extradition. 369. Treaties concerning. 369.
- EXTRA SESSIONS.** The President may, on extraordinary occasions, convene both Houses, or either of them; with respect to the time of adjournment he may adjourn them to such time as he may think proper. Art. II, sec. 3, p. 420.

F.

- FACT.** And no fact tried by a jury shall be otherwise re-examined in any other court of the United States than according to the rules of the common law. Art. VII, p. 493. This amendment applies only to the Federal courts. 493.
- FAITH.** Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. Art. IV, sec. 1, p. 447.
- FEDERAL DISTRICT.** The District of Columbia is a corporation liable for the acts of its officers. 385.
- FEDERAL QUESTION.** How it must be disclosed. 455. Defined. 460. If a State court refuse to give credit to a judgment it raises the Federal question. 464.
- FELONIES.** Treason, and breach of the peace, not among the privileges from arrest. Art. I, sec. 6, cl. 1, p. 361.
Congress has the right to define and punish piracies and felonies committed on the high seas. Art. I, sec. 8, cl. 10, p. 366.

FELONIES—Continued.

- A person charged in any State with treason, felony, or other crime, &c., shall be delivered up. Art. 4, sec. 2, cl. 2, p. 453.
- FINES.** Excessive bail shall not be required, nor excessive fines imposed. Art. VIII, p. 476.
- FORCES.** Congress has power to make rules for the government and regulation of the land and naval forces. Art. I, sec. 8, cl. 14, p. 366.
- FOREIGN COIN.** Congress has the power to regulate the value of. Art. I, sec. 8, cl. 5, p. 365.
- By what acts made legal tender. 370.
- FOREIGN JUDGMENTS.** Are not affected by Art. IV, sec. 1, of the Constitution. 467.
- FOREIGN NATIONS.** Congress has the right to regulate commerce with. Art. I, sec. 8, cl. 3, p. 365.
- FOREIGN STATE.** No person holding office shall accept any present, &c., from any. Art. I, sec. 9, cl. 8, p. 393.
- And between a State and the citizens thereof, and foreign states, citizens, or subjects. Art. III, sec. 2, cl. 1, p. 429.
- FORFEITURE.** No attainder of treason shall work corruption of blood or forfeiture, except during the life of the person attainted. Art. III, sec. 3, cl. 2, p. 443. Under the confiscation act of 1862, and the explanatory joint resolution of the same date, only the life estate of the person upon whose offense the land had been condemned, passed. 461. The whole subject reviewed. *Id.*, pp. 443-446. If the estate in fee was condemned, only the life estate passed, and the life estate having passed, nothing remained in the offender. 461.
- FORTS.** Exclusive legislation over. Art. I, sec. 8, cl. 17, p. 366.
- Purchased with the consent of the States, how far within the jurisdiction of the United States. 386. The ordinary laws of the State do not prevail. *Id.*
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G.

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- GENERAL WELFARE.** How promoted. 296.
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- GOVERNMENT.** Congress has power to make rules for the government and regulation of the land and naval forces. Art. I, sec. 8, cl. 14, p. 366.
- And all other powers vested by this Constitution in the Government of the United States, &c. Art. I, sec. 8, cl. 18, p. 367.
- And to petition the Government for a redress of grievances. Art. I, p. 466.
- This is an attribute of national citizenship guaranteed by the United States. 481, p. 469.
- Theory of, as to election of magistrates. 336. Fraud in naturalization may be reached by contested election. 337. Gross frauds will not be overlooked. 338. Where there is no suspicion of. 341.
- The powers of the people confer on this Government were to be exercised by itself. 490. And the President has no power over life, liberty, or property. *Id.*
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LAW OR EQUITY. The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State or by citizens or subjects of any foreign State. Art. XI, p. 478.

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No soldier shall, in time of peace, be quartered in any house without the consent of the owner, nor in time of war, but in a manner to be prescribed by law. Art. III, p. 470.

No person held to service or labor in one State under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor. Art. IV, sec. 2, cl. 3, p. 453.

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- Nor shall any State deprive any person of life, liberty, or property, without due process of law. Art. XIV, sec. 1, p. 482. This right is not one growing out of citizenship of the United States. 505.
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A well-regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed. Art. II, p. 469.
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- NUMBERS.** Not increased by emancipation. 308. Can only be enumerated every ten years. *Id.* The States must all be represented under the same enumeration. *Id.* A smaller, may adjourn from day to day, and may be authorized to compel the attendance of absent members. Art. I, sec. 5, cl. 1, p. 337. Of electors to the whole number of Senators and Representatives to which the States may be entitled. Art. II, sec. 1, cl. 2, p. 400. According to their respective numbers counting the whole number of persons in each State, excluding Indians not taxed; but if the right to vote shall be denied to any numbers, the apportionment shall be correspondingly abridged. Art. XIV, sec. 2, p. 488, note 509.
- O.**
- OATH.** Or affirmation of Senators when trying impeachments. P. 322. Of the Chief Justice on trial of President. 322. Same oath administered to the Senators. *Id.* Of election officers. 340. Omission of, alone not fatal. *Id.* Resolution concerning, as to members. 346. Of the President. Art. II, sec. 1, cl. 7, p. 406. Is to be taken in connection with the duty to see that the law is faithfully executed. 414. Required by the Constitution of the United States. Art. VI, cl. 3, p. 464. General and modified. 480. No warrant shall issue but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. Art. IV, p. 470. No person, &c., who having previously taken an oath, &c., shall have engaged in rebellion, &c. Art. XIV, sec. 3, p. 493.
- OBLIGATION OF CONTRACTS.** No State shall pass any law impairing. Art. I, sec. 10, cl. 1, p. 393. The law which annuls the remedy impairs. 400. If valid in inception the contract remains so. *Id.*
- OCCASIONS.** The President may, on extraordinary occasions, convene both Houses, or either of them; with respect to the time of adjournment, he may adjourn them to such time as he shall think proper. Art. II, sec. 3, p. 420.
- OFFENSE.** Nor shall any person be subject, for the same offense, to be twice put in jeopardy of life or limb. Art. V, p. 470. Jeopardy defined. 486. No one can be twice lawfully punished for the same offense within the same jurisdiction. *Id.*
- OFFENSES.** Congress has the power to define and punish offenses against the law of nations. Art. I, sec. 8, cl. 10, p. 366. Committed in places purchased for forts, arsenals, dock-yards, &c., are within the exclusive jurisdiction of the United States. 386. The President has power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment. Art. II, sec. 2, cl. 1, p. 407.

- OFFICE.** Removal from, and disqualification for in cases of impeachment. P. 330, cl. 7.
 No Senator or Representative who has helped to create shall fill, and no person holding any office shall be a member of either House during his continuance in. Art. I, sec. 6, cl. 2, p. 362. An officer in the army comes within the same inhibition. n. 356.
 Vested in any department or officer thereof. Art. I, sec. 8, cl. 18, p. 367.
 No person holding any office of profit or trust under the United States shall, without the consent of the Congress, accept any present, emolument, office, or title of any kind whatever, from any king, prince, or foreign State. Art. I, sec. 9, cl. 8, p. 393.
 No Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector. Art. II, sec. 1, cl. 2, p. 400.
 The President shall hold his term of office for four years. Art. II, sec. 1, cl. 1, p. 398.
 In case of the removal of the President from office, who shall serve. Art. II, sec. 1, cl. 5, p. 404.
 The President's oath to execute. Art. II, sec. 1, cl. 7, p. 406.
 Various opinions upon the power to remove from, 429. Tenure of office law at present. 430.
 All civil officers of the United States shall be removed from office on impeachment. Art. II, sec. 4, p. 423.
 No person shall hold any office, civil or military, under the United States, or under any State, who having previously taken an oath, &c., shall have engaged in rebellion. Art. XIV, sec. 3, p. 493.
OFFICER. Congress may provide what officer shall act as President when neither President nor Vice President can act. Art. II, sec. 1, cl. 5, p. 404, n. 412.
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 For the various lists of appointments since the foundation of the Government. 422. Those who have been temporarily appointed. Id.
 The President shall commission all officers of the United States. Art. 2, sec. 3, p. 420.
 All civil officers of the United States shall be removed from office on impeachment. Art. II, sec. 4, p. 423.
OFFICES. The judges shall hold their offices during good behavior, and their compensation shall not be diminished during their continuance in office. Art. III, sec. 2, p. 427.
OPINION. The President may require the opinion in writing of the principal officer in each of the executive departments. Art. II, sec. 2, cl. 1, p. 407.
ORDER. Every order, resolution, or vote, to which the concurrence of both Houses may be necessary, (except on a question of adjournment,) shall be presented to the President for approval or disapproval, and can be passed over the latter by a two-third's vote, in the same manner as a bill. Art. I, sec. 7, cl. 2, p. 363.
ORGANIZATION. Of the various Territories, 473.
OVERT ACT. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act or on confession in open court. Art. III, sec. 3, cl. 1, p. 443.
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P.

- PRACTICE.** In cases of *habeas corpus* in the Supreme Court of the United States. 389.
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- PRESENTS.** No person shall accept any, &c., from a foreign power. Art. I, sec. 9, cl. 8, p. 393.
- PRESIDENT.** When the President of the United States is tried the chief justice shall preside. Art. I, sec. 3, cl. 6, p. 323, n. 323.
- How the chief justice presides on his trial. 323.
- The executive power shall be vested in the President and Vice President of the United States of America. He shall hold his office during the term of four years, and, together with the Vice President, chosen for the same term, be elected as follows. Art. II, sec. 1, cl. 1, p. 398.
- And Vice President, how chosen. Art. XII, cl. 1, pp. 401, 402.
- No person constitutionally ineligible to the office of President shall be eligible to that of Vice President of the United States. Art. XII, cl. 3, p. 402.
- Must have been fourteen years a resident of the United States to be eligible to the presidency. Art. II, sec. 1, cl. 4, p. 404.
- Cases in which the Vice President or other officer may serve as President. Art. II, sec. 1, cl. 5, p. 404.
- Shall at stated times receive for his services a compensation which shall neither be increased nor diminished during the period for which he shall have been elected. Art. II, sec. 1, cl. 6, p. 405.
- His oath of office. Art. II, sec. 1, cl. 7, p. 406, n. 414.
- Shall be commander in chief, and other powers. Art. II, sec. 2, cl. 1, p. 407.
- History of the commission of the commander in chief. 415.
- Has power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment. Art. II, sec. 2, cl. 1, p. 407.
- Shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur. Art. II, sec. 2, cl. 2, p. 412.
- All the duties of the President are prescribed by the Constitution and the law. 420.
- The President shall have power to fill up all vacancies that shall happen during the recess of Congress by granting commissions, which shall expire at the end of the next session. Art. II, sec. 2, cl. 3, p. 417.
- His various powers and duties under. Art. II, sec. 3, p. 420.
- Shall take care that the laws be faithfully executed. Art. II, sec. 3, p. 420.
- Shall from time to time give to the Congress information of the state of the Union. Art. II, sec. 3, p. 420.
- The President and Vice President, and all civil officers of the United States, shall be removed from office on impeachment. Art. II, sec. 4, p. 423.
- May be impeached for wanton removals. 431.
- His right to judge of the constitutionality of the law. 478. Is vested with important political powers. Id.
- The President, like all other officers, is liable to have his acts reviewed by the press. 482.
- When the right to vote at any election for the choice of electors for President and Vice President of the United States, &c. Art. XIV, sec. 2, p. 488.
- PRESIDENT PRO TEMPORE.** Chosen by the Senate. P. 317, cl. 5. Further list of the. N. 318. The contingencies of his office. N. 318, pp. 318, 319.
- PRESS.** Congress shall make no law abridging the freedom of speech or of the press. Art. I, p. 466. The reason of the inhibition. 482. It is a right which antedated the Constitution. Id. The four things which it embraces. Id. But unrestrained speech is fatal to liberty, and it is not innocent because it is not muzzled. Id.
- PRINCE.** No person holding office shall accept any present, &c., from any. Art. I, sec. 9, cl. 8, p. 393.
- PRIVATE PROPERTY.** Nor shall private property be taken for public use without just compensation. Art. V, p. 470.
- Public use defined and explained. 489.
- PRIVILEGE.** The, of the right of *habeas corpus* shall not be suspended. Art. I, sec. 9, cl. 2, p. 386.
- PRIVILEGES.** The citizens of each State shall be entitled to all the privileges and immunities of the citizens of the several States. Art. IV, sec. 2, cl. 1, p. 453. The Supreme Court will not define privileges and immunities in a general classification. 469.
- No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States. Art. XIV, sec. 1, p. 482. The distinction between the citizens of the United States and States suggested. 502. The clause was borrowed from the articles of confederation. Id. The terms defined and considered. Id. More critically considered. 503.

PRIVILEGES—Continued.

- The manner of enforcement would depend upon the character of the privilege or immunity in question. 503. The various privileges and immunities considered. *Id.* The end to be remedied by the last sentence. 504.
- PRIVILEGED QUESTION.** Action upon the veto of the President is privileged. 357.
- PROCEEDINGS.** Full faith and credit shall be given to the judicial proceedings of every State, and the Congress may prescribe the mode of proof and effect. Art. IV, sec. 1, p. 447.
- PROCLAMATION.** President may pardon by general proclamation. 417, 418.
- PROFIT OR TRUST.** No person holding any office of, shall accept any present, &c., from a foreign power. Art. I, sec. 9, cl. 8, p. 393.
- PROGRESS.** Congress has power to promote the progress of science and useful arts, &c. Art. I, sec. 8, cl. 8, p. 365.
- PROMISSORY NOTES.** Placed on the same footing as bills of exchange. 454, 456.
- PROMOTION.** The President's power over appointments is subject to the law of promotion. 381.
- PROPERTY.** No person shall be deprived of life, liberty, or property without due process of law. Art. V, p. 470. This means judicial process, not executive. 487. Due process of law explained. 488. The inhibition applies only to the United States Government. *Id.*
Nor shall any State deprive any person of life, liberty, or property without due process of law. Art. XIV, sec. 1, p. 482. This right is not one growing out of citizenship of the United States. 505.
- PROPORTION.** No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken. Art. I, sec. 9, cl. 4, p. 392.
In what proportion representation to be reduced. Art. XIV, sec. 2, p. 488.
- PROSECUTIONS.** In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed. Art. VI, p. 474. Criminal prosecutions defined. 490. The limitations by this power. *Id.*
- PROTECTION.** No State shall deny to any person within its jurisdiction the equal protection of the laws. Art. XIV, sec. 1, p. 482. The clauses apply with peculiar force to the emancipated race. 501. The slaughter-house cases criticised. 505.
- PROTEST.** Tax paid under, may be recovered in assumpsit. 366.
- PROVISIONAL GOVERNMENT.** The rebellion authorized the establishment thereof. 377.
- PUBLIC DEBT.** The validity of the public debt of the United States authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. Art. XIV, sec. 4, p. 496.
- PUBLIC ENEMIES.** Under the confiscation act of 1862 property was condemned as the property of public enemies. 461.
- PUBLIC MINISTERS.** The President has power to appoint ambassadors, other public ministers and consuls, and all other officers. Art. II, sec. 2, cl. 2, p. 412.
- PUBLIC TRIAL.** In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed. Art. VI, p. 474. Criminal prosecutions defined. 490. The limitations by this power. *Id.*
- PUBLIC TRUST.** No religious test shall ever be required for any office or public trust under the United States. Art. VI, cl. 3, p. 464.
- PUBLIC USE.** Nor shall private property be taken for public use without just compensation. Art. V, p. 470. Public use defined and explained. 489.
- PUNISH.** Each House may, its members for disorderly behavior. Art. II, sec. 5, cl. 2, p. 353. How the House of Commons punished Sir Francis Biddett. 349. The House has not general criminal jurisdiction. 349. The sentence criticised. *Id.* The power to punish those not members. *Id.* Pat. Wood's case. 349, p. 354. The power denied as to local Legislatures. 349, p. 355. The great case of Doyle v. Falconer. 350. Of Joseph B. Stewart. 351. Of Anderson v. Dunn. 352.
- PUNISHMENT.** Further, of those who have been impeached. Art. I, sec. 3, cl. 7, p. 330. Congress has the power to provide the punishment for counterfeiting the securities and current coin of the United States. Art. I, sec. 8, cl. 6, p. 365.
The Congress shall have power to declare the punishment of treason. Art. III, sec. 3, cl. 2, p. 443.
Except as a punishment for crime, whereof the party shall have been duly convicted. Art. XIII, sec. 1, p. 478.
- PUNISHMENTS.** Nor cruel and unusual punishments inflicted. Art. VIII, p. 476.

Q.

- QUALIFICATION.** No religious test shall ever be required as a qualification to any office or public trust under the United States. Art. VI, cl. 3, p. 464.
- QUALIFICATIONS.** Difference of, when the Constitution was adopted. 299. The word "white" stricken out by the fifteenth amendment. Id. But neither amendment gave the right of suffrage to women. Id.
- Of electors for Representatives the same as for the most numerous branch of the State Legislature. Art. I, sec. 2, cl. 1, p. 303.
- Of Representatives. Art. I, sec. 2, cl. 2, p. 305. Of Senators. Art. I, sec. 3, cl. 3. Of the President and Vice President. Art. II, sec. 1, cl. 4, p. 404.
- Each House may judge of the, and moral fitness of its members. 345.
- He who denies them has the burden of proof. 348.
- QUARANTINE.** The States may enact quarantine laws, but they must not extend to the levy of tonnage. 366. Under the term the State cannot levy a tonnage. Id.
- QUORUM.** A majority of each House shall constitute a quorum to do business, but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner and under such penalties as each House may provide. Art. I, sec. 5, cl. 1, p. 337.*

R.

- RACE.** The right of citizens of the United States to vote shall not be denied or abridged by the United States or any State on account of race, color, or previous condition of servitude. Art. XV, sec. 1, p. 493.
- RATIFICATION.** The ratification of the conventions of nine States shall be sufficient for the establishment of this Constitution between the States so ratifying it. Art. VII, p. 464.
- REBELLION.** When rebellion commenced and ended. 377.
- The privilege of the writ of *habeas corpus* shall not be suspended unless when in cases of rebellion or invasion the public safety may require it. Art. I, sec. 9, cl. 2, p. 386. The power to suspend lies with Congress only. 393.
- Except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion to the number such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State. Art. XII, sec. 2, p. 488.
- Who shall have engaged in insurrection or rebellion against the United States or given aid or comfort to the enemies thereof. Art. XIV, sec. 3, p. 494. This sentence criticised and explained. 511.
- Pensions and bounties for services in suppressing insurrection or rebellion shall not be questioned. No debt for insurrection or rebellion shall be paid by the United States or any State. Art. XIV, sec. 4, p. 496.
- President had the right to pardon all participants by general proclamation. 418.
- RECEIPTS AND EXPENDITURES.** A regular statement and account of the receipts and expenditures of all public money shall be published from time to time. Art. I, sec. 9, cl. 7, p. 393.
- RECESS.** Election of Senators during the recess of the Legislature. Art. I, sec. 3, cl. 2, p. 314, n. 312-314.
- The President shall have power to fill up all vacancies that shall happen during the recess of Congress by granting commissions which shall expire at the end of the next session. Art. II, sec. 2, cl. 3, p. 417.
- RECIPROCITY.** Concerning naturalization and extradition. 369.
- RECORDS.** Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof. Art. IV, sec. 1, p. 447. Notice actual or constructive is necessary to a judgment. 462. And where there is notice faith is given to judgments for divorce. 463. If the court refuse to respect the judgment it becomes a Federal question. 464. The general principle reviewed. 465. The judgment by attachment is valid as to property sold only. Id. But there must be jurisdiction over the subject matter of the suit. 466. The right to go behind the judgment for fraud or want of jurisdiction fully considered. 467.
- REGULATION.** Congress has power to make rules for the government and regulation of the land and naval forces. Art. I, sec. 8, cl. 14, p. 366.
- No preference shall be by any regulation of commerce or revenue to the ports of one State over those of another. Art. I, sec. 9, cl. 6, p. 392.

REGULATION—Continued.

No person held to service or labor in one State under the laws thereof escaping into another shall, in consequence of any law or regulation therein, be discharged from such service or labor, &c. Art. IV, sec. 2, cl. 3, p. 456.

RELIGION. No religious test shall ever be required. Art. VI, cl. 3, p. 464. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. Art. I, p. 466. The full extent of the right explained. 481.

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Various opinions upon the power to remove. 429. Tenure of office law at present. 430.

The President may be removed for wanton removals. 431.

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No person shall be a Senator or Representative in Congress, &c., who, having taken an oath as a member of Congress, &c., shall have engaged in insurrection and rebellion, &c. Art. XIV, sec. 5, p. 493.

REPRIEVES AND PARDONS. The President has power to grant, except in cases of impeachment. Art. II, sec. 2, cl. 1, p. 407.

REPRISAL. Congress has power to grant letters of marque and reprisal. Art. I, sec. 8, cl. 11, p. 366.

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RESIGNATION. Vacancies may happen by resignation, death, or otherwise. Art. I, sec. 3, cl. 2, p. 314. Of Senators, may be prospective. 313.

In case of the resignation, &c., of the President, who shall serve. Art. II, sec. 1, cl. 5, p. 404.

RESPECT. With respect to the time of adjournment in case of disagreement, the President may adjourn Congress. Art. II, sec. 3, p. 420.

RETURN. To the writ of *habeas corpus*, and the action upon it. 391.

REVENUE. No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another. Art. I, sec. 9, cl. 6, p. 392.

RIGHT. Congress shall make no law abridging the right of the people peaceably to assemble and petition the Government for a redress of grievances. Art. I, p. 466.

The right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State, on account of race, color, or previous condition of servitude. Art. XV, sec. 1, p. 496. This is a negative pregnant with an affirmative. 513. It confers no right, but is an inhibition. *Id.* It destroys all distinction between the races as to suffrage. *Id.*

RIGHTS. The enumeration in the Constitution of certain rights shall not be construed to disparage others retained by the people. Art. IX, p. 477.

RULES. Congress has power to make rules concerning captures on land and water. Art. I, sec. 8, cl. 11, p. 366.

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RULES AND REGULATIONS. Congress has power to make all needful rules and regulations respecting the territory or other property belonging to the United States. Art. IV, sec. 3, cl. 2, p. 454.

S.

SAFETY. The privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it. Art. I, sec. 9, cl. 2, p. 386.

- SCIENCE.** Congress has the power to promote the progress of science and useful arts, &c. Art. I, sec. 8, cl. 8, p. 365.
The protection to authors and inventors. 373. Their inventions and books exempt from forced sale. *Id.*
- SEARCHES AND SEIZURES.** The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated. Art. IV, p. 470.
- SECESSION.** Answer to. 289, p. 299.
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- SECURITY.** A well-regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed. Art. II, p. 469.
- SENATE.** And House of Representatives compose the Congress. Art. I, sec. 1, p. 303.
Composed of two Senators from each State chosen every six years. Art. I, sec. 3, cl. 1, p. 312. By the legislature. *Id.* Legislature defined. 311. Cases in Alabama and Louisiana, *Id.*
And House of Representatives observe the same rules in regard to concurrent orders and resolutions as in regard to bills. Art. I, sec. 7, cl. 3, p. 363.
The President has power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur. Art. II, sec. 2, cl. 2, p. 412.
Vice President shall be the president of the. Art. I, sec. 3, cl. 4, n. 317. Shall choose their other officers and also president *pro tempore*. P. 317, cl. 5. Its power over this officer. N. 318.
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- SENATORS.** Two from each State chosen by the Legislature thereof every six years. Art. I, sec. 3, cl. 1, p. 312. How classified. P. 314, cl. 2. If vacancies happen. *Id.*, and notes 312-314.
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How far subject to the will of the people. 336, p. 341.
And Representatives shall receive a compensation, &c. Art. I, sec. 6, cl. 1, p. 361. Their privilege from arrest. *Id.* Compensation discussed. 354. Privilege from arrest and service discussed. 355.
No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office, &c., nor shall any person holding office be at the same time a Senator or Representative. Art. I, sec. 6, cl. 2, p. 362, n. 356.
No Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector. Art. II, sec. 1, cl. 2, p. 400.
And Representatives to take the prescribed oath. Art. VI, cl. 3, p. 464. The form, general and qualified. 480.
No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States or under any State, who, having taken an oath, &c., shall have engaged in rebellion, &c. Art. XIV, sec. 3, p. 493. The oath. 510. Shall have engaged in rebellion explained and criticised. *Id.*
- SERVICE.** Members of Congress not privileged from service of civil process if no arrest be demanded, and are not subject to attachment for contempt. 355.
The President shall be commander in chief of the militia when in the actual service of the United States. Art. II, sec. 2, cl. 1, p. 407.
Personal and *in rem*. 456, p. 440.
No persons held to service or labor in one State under the laws thereof escaping into another shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due. Art. IV, sec. 2, cl. 3, p. 453.
Or in the militia when in actual service in time of war or public danger. Art. V, p. 470.
- SERVICES.** The judges shall at stated times receive for their services a compensation. Art. III, sec. 2, p. 427.
- SERVITUDE.** Involuntary servitude, &c., shall not exist. Art. XIII, sec. 1, p. 478. This means a personal servitude. 497. Full consideration of the subject. *Id.*
No person shall be deprived of voting on account of race, color, or previous condition of servitude. Art. XV, sec. 1, p. 496.
- SESSIONS.** Of Congress, to commence on the first Monday in December. P. 334, cl. 2. Beginning and ending of sessions, general and special. 333.
By granting commissions, which shall expire at the end of their next session. Art. II, sec. 2, cl. 3, p. 417.
- SHIPS OF WAR.** No State shall keep, in time of peace. Art. I, sec. 10, cl. 3, p. 397.

- SLANDER.** The common law never punished a verbal slander criminally. 482.
- SLAVE.** Neither the United States, nor any State, shall pay any claims for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void. Art. XIV, sec. 4, p. 496.
- SLAVERY.** No amendments prior to 1808 to affect. Art. V, p. 459.
- Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. Art. XIII, cl. 1, p. 478. The effect of this prohibition. 496. Involuntary servitude considered. 497. Had peculiar reference to the negroes. Id. The views of Lincoln and Seward upon the subject. 498. The destruction did not destroy contracts. 499.
- SOLDIER.** No soldier shall, in time of peace, be quartered in any house without the consent of the owner, nor in time of war, but in a manner to be prescribed by law. Art. III, p. 470.
- SOVEREIGN POWER.** May be in a *de facto* government. 384.
- SOVEREIGNTY.** Of the States, extends to what. 404.
- Extends to all persons, things, and strangers within the country. 418, p. 411.
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- STATE.** No tax or duty shall be laid on articles exported from any State. Art. I, sec. 9, cl. 5, p. 392.
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- No person holding office under the United States shall accept any, &c., from any foreign State. Art. I, sec. 9, cl. 8, p. 393.
- No State shall enter into any treaty, or do nine other enumerated things; nor, without consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for the execution of its inspection laws; nor lay any duty of tonnage, keep troops or ships of war in time of peace; enter into an agreement or compact with another State, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay. Art. I, sec. 10, cls. 1, 2, 3, pp. 393-397.
- And no State shall enter into any treaty, alliance, or confederation, &c. Inhibitions upon. Art. I, sec. 10, cls. 1, 2, 3, pp. 383-399.
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- Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. Art. IV, sec. 1, p. 447.
- The citizens of each State shall be entitled to all the privileges and immunities of the citizens of the several States. Art. IV, sec. 2, cl. 1, p. 452. But corporations are not citizens within the meaning of this clause. 468, 469.
- A person charged in any State with treason, felony, or other crime, who shall flee from justice and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime. Art. IV, sec. 2, cl. 2, p. 453.
- No person held to service or labor in one State escaping into another, shall be discharged from such service or labor. Art. IV, sec. 2, cl. 3, p. 453.
- The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion. Art. IV, sec. 4, p. 458. The President had the right to establish provisional governments for. 475.

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And of the State wherein they reside. Nor shall any State deprive any person of life, liberty, or property without due process of law. Art. XIV, sec. 1, p. 482.

But when the right to vote is denied to any of the inhabitants of such State, &c. Art. XIV, sec. 2, pp. 488, 489, n. 508.

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Nor shall any State assume or pay any debt or obligation incurred in aid of insurrection or rebellion, &c. Art. XIV, sec. 4, p. 496.

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But neither the United States nor any State shall assume or pay any debt or obligation in aid of insurrection or rebellion against the United States. Art. XIV, sec. 4, p. 496.

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude. Art. XV, sec. 1, p. 496. The term fully explained. 513.

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Congress has the right to regulate commerce among the several. 364. This includes every means by which intercourse and trade are carried on within them. *Id.* The question of power has always been difficult. 365. States cannot tax passengers going through or out of them. 365.

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Treason against the United States shall consist in levying war against them, or adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason but on the testimony of two witnesses to the same overt act, or upon confession in open court. Congress shall have power to punish treason, but treason shall not work corruption of blood except during the life of the person attainted. Art. III, sec. 3, cls. 1, 2, p. 443. Forfeiture defined and reviewed. 461.

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Treason against the United States shall consist in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason, unless on the testimony of two witnesses to the same overt act, or on confession in open court. The Congress shall have power to declare the punishment of treason; but no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted. Art. III, sec. 3, cl. 1, 2, p. 443. The forfeiture defined and reviewed. 461.

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No person shall hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, &c., shall have engaged in rebellion. Art. XIV, sec. 3, p. 493.

The validity of the public debt of the United States, &c., but neither the United States, nor any State, shall assume or pay any debt or obligation in aid of insurrection or rebellion against the United States. Art. XIV, sec. 4, p. 496.

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WEST VIRGINIA. History of its creation, &c. 447.

WITNESS. No person shall be compelled in any criminal case to be a witness against himself. Art. V, p. 470.

WITNESSES. No person shall be convicted of treason, unless on the testimony of two witnesses to the same overt act, or upon confession in open court. Art. III, sec. 3, cl. 1, p. 443.

The accused shall be confronted with the witnesses against him, and shall have compulsory process for obtaining witnesses in his favor. Art. VI, p. 474.

WOMEN. Not given suffrage by the constitutional amendments. 299.

Are persons and citizens of the United States, but they are not thereby entitled to vote until the States shall give them that power. 502, p. 485.

WRITINGS. Congress may secure for limited times to authors exclusive right to their writings. Art. I, sec. 8, cl. 8, p. 365.

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